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In The
Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

ANDREW SASSER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing on Sasser's *Atkins* claim, when his counsel did not diligently develop available facts supporting the claim during State court proceedings.

2. Whether the district court has the authority to expand the record to determine whether Sasser's *Atkins* claim warrants an evidentiary hearing, or must, based solely on the facts alleged in the petition, hold a hearing.

3. Whether the mandatory language of 28 U.S.C. § 2244(b)(4) requires the district court to consider the timeliness of Sasser's *Atkins* claim under 28 U.S.C. § 2244(d)(1) before the claim may be adjudicated on the merits.

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PETITION FOR WRIT OF CERTIORARI

Larry Norris, Director of the Arkansas Department of Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 553 F.3d 1121. Appendix at 1-16. The unreported decision of the United States District Court for the Eastern District of Arkansas is reproduced in the appendix at 17-37. The district court's order denying respondent Sasser's motion to amend the judgment is reproduced in the appendix at 38-46.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 2009. Appendix at 1. The order denying the petition for rehearing *en banc* was entered on April 14, 2009. Appendix at 50-52. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 28 U.S.C. § 2244, which imposes a statute of limitations for habeas corpus cases and sets forth procedures for, and restrictions of, the federal courts' exercise of power over second or successive habeas corpus petitions filed by persons in State custody, is reproduced in the appendix at 53-56.

Title 28 U.S.C. § 2254(e)(2), which restricts federal courts' authority to hold evidentiary hearings in habeas corpus cases involving claims based on new rules of constitutional law and newly discovered facts, is reproduced in the appendix at 57.

STATEMENT OF THE CASE

This case presents important questions about the proper construction and application of the Antiterrorism and Effective Death Penalty Act (AEDPA) as it relates to habeas corpus petitions in which state prisoners seek to take advantage of new rules of constitutional law. The Eighth Circuit held that when a state prisoner raises a claim that is based on a previously unavailable rule of constitutional law, a district court

is obligated to hold an evidentiary hearing and adjudicate the merits of the claim as long as it is sufficiently pleaded in the petition, despite the prisoner's complete failure to develop the facts underlying the claim in state court. Appendix at 7-10. The Eighth Circuit further held that, when such a claim is raised in a second or successive petition, the mandatory language of 28 U.S.C. § 2244(b)(4) does not obligate the district court to consider the timeliness of the claim before it holds the mandatory hearing and adjudicates the merits of the claim. Appendix at 13-15. The court ruled that the burden to assert the limitations issue in a second or successive habeas corpus proceeding rests on the State and, just as it does in a first-petition case, it remains subject to the traditional rule of forfeiture, as modified by *Day v. McDonough*, 547 U.S. 198 (2006). *Id.*

The Eighth Circuit's decision presents issues that deserve further review concerning: (1) how 28 U.S.C. § 2254(e)(2) applies to a claim that is based on a previously unavailable rule of constitutional law; (2) if § 2254(e)(2) does not apply to bar a hearing, whether the district court has the authority to expand the record to determine whether a hearing is warranted; and (3) what effect the mandatory language in 28 U.S.C. § 2244(b)(4) has on the parties' burdens and the district court's responsibility to address the timeliness of a second or successive claim before it may be adjudicated on the merits.

A. The Court of Appeals' Authorization Decision

Sasser was convicted of capital murder in 1994 and was sentenced to death by lethal injection. *See Sasser v. State,* 321 Ark. 438, 441, 902 S.W.2d 773, 775 (1995). He pursued his ordinary appellate and post-conviction remedies in state court, and his first federal habeas corpus proceeding was dismissed with prejudice on May 28, 2002. *See* Appendix at 2. Sasser appealed the decision a week after this Court announced its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Appendix at 3. Almost a year later, he filed a motion for remand or, alternatively, for permission to file a second petition raising a claim based on the rule announced in *Atkins*. Appendix at 3, 14.[1]

The Eighth Circuit granted Sasser's motion in a judgment issued August 15, 2003, which it subsequently amended March 9, 2004. It did so in a limited order of remand, instructing the district court that "[t]he issue on remand is limited to the question of whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia,* 536 U.S. 304, 122

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[1] The Eighth Circuit opinion first states the motion was filed on June 18, 2003, and later states it was filed on June 19, 2003. Appendix at 3, 14. The Eighth Circuit's docket indicates that the motion was filed on June 17, 2003, and that a supplemental motion was filed on June 19, 2003. *Sasser v. Norris*, No. 02-3103 (8th Cir.) (Docket Entries, June 17, 2003 & June 19, 2003).

S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution." Appendix at 13, 47-49.

B. The District Court Proceedings Following Authorization

The district court reopened Sasser's first proceeding and issued a scheduling order directing Sasser to file an amended petition and directing the State to respond to the amended petition within a set period of time. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 45, Scheduling Order, at 1 (W.D. Ark. May 21, 2004). The order did not account for preliminary review under 28 U.S.C. § 2254 Rule 4. Sasser filed his petition on September 3, 2004, raising the Eighth Amendment *Atkins* claim he had presented for authorization to the Eighth Circuit and adding more claims, some new – including a claim that counsel had been ineffective in failing to prepare and present evidence of mental retardation in state court – and some that duplicated grounds that had been adjudicated in his first petition. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 48, Second Supplemental and Amended Petition for Writ of Habeas Corpus, at 5-31 (W.D. Ark. Sept. 3, 2004).

Following the State's answer and Sasser's reply, the district court issued a scheduling order setting deadlines for discovery. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 59, Scheduling Order (W.D. Ark. Nov. 22, 2005). The State opposed discovery, asserting for the first time that, pursuant to 28 U.S.C.

§ 2244(b)(4), the district court was obligated to dismiss Sasser's petition without a hearing unless he first showed his claims satisfied 28 U.S.C. § 2244, and he could not do so because, *inter alia*, his petition was untimely under 28 U.S.C. § 2244(d). The State further asserted that a hearing was precluded, in any event, by 28 U.S.C. § 2254(e)(2). *Sasser v. Norris,* No. 00-4036, Docket Entry No. 61, Motion to Preclude Discovery or, in the Alternative, Motion for Discovery at 1, 3-6 (W.D. Ark. Jan. 13, 2006). Nevertheless, the district court issued an order informing the parties that discovery and expansion of the record was necessary "to assist with the question of whether an evidentiary hearing is warranted," *Sasser v. Norris,* No. 00-4036, Docket Entry No. 64, Order at 2-3 (W.D. Ark. Feb. 13, 2006), and it granted Sasser's request for discovery to obtain documents related to mental evaluations he had undergone prior to his trial.

Four months later, the district court issued another scheduling order, setting a cut-off date for discovery, a deadline for Sasser to submit any additional information he wanted the court to consider in relation to his *Atkins* claim, and warning that his failure to request to submit any additional information by way of amendment of his petition, supplementation of the record, or by evidentiary hearing would serve as notice that he did not intend to present additional information to the court. Appendix at 19-20. Sasser did not seek to present additional information, and the district court subsequently considered the substantive allegations and evidentiary

proffer supporting his *Atkins* claim. The court concluded that, even assuming the claim had been unavailable prior to the decision in *Atkins*, a hearing was foreclosed by § 2254(e)(2)(B) and relief unwarranted because, considering the allegations in his petition and the evidentiary proffer he had made, the facts underlying his *Atkins* claim, if proven, would be insufficient to show by clear and convincing evidence that but for the constitutional error no reasonable factfinder would have imposed a sentence of death. Appendix at 29-32.

Sasser challenged the district court's conclusion in a motion for post-judgment relief, arguing that 28 U.S.C. § 2254(e)(2) did not apply to him because he could not have failed to develop the factual basis for his claim in state court at a time when the claim was unavailable. Appendix at 40. Relying on *Williams v. Taylor*, 529 U.S. 420 (2000), the district court determined that Sasser indeed exhibited a lack of diligence for purposes of § 2254(e)(2), particularly because he failed to avail himself of a State remedy that made mentally-retarded persons categorically ineligible for the death penalty and provided a procedure for adjudicating such a claim. *See* Ark. Code Ann. § 5-4-618(b) & (d) (Repl. 2006) (enacted in 1993). Appendix at 39-40. The court further concluded that, even assuming the *Atkins* claim had been previously unavailable for purposes of 28 U.S.C. § 2254(e)(2)(A)(i), Sasser had done nothing in two years to substantiate his allegations and proffer, which the court found simply insufficient to satisfy the standard to warrant

a hearing under 28 U.S.C. § 2254(e)(2)(B). Appendix at 40-42.

C. The Court of Appeals' Decision

Sasser appealed the denial of relief, relying exclusively on *Simpson v. Norris,* 490 F.3d 1029 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied*, 128 S.Ct. 1226 (2008), to support his argument that, because his *Atkins* claim had been previously unavailable, it had to be adjudicated on the merits after a mandatory evidentiary hearing. In addition to arguing that the district court correctly denied relief without a hearing, the State alternatively argued that the court could affirm on a ground not considered or decided by the district court, that being, *inter alia*, the untimeliness of Sasser's petition.

The Court of Appeals reversed and remanded "for an evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim." Appendix at 12, 15-16. Relying on its decision in *Simpson*, it held that because the Eighth Amendment claim was unavailable before the decision in *Atkins*, any failure to develop the claim or the facts underlying it in State court was "irrelevant" to the question of whether Sasser was entitled to an evidentiary hearing and adjudication on the merits of his claim. Appendix at 8-9. The court explained that an evidentiary hearing is mandatory as long as a previously unavailable claim is well pleaded in a petition. As the court put it, "*Simpson* explains Sasser is entitled to a hearing

simply by virtue of 'alleg[ing] that he is mentally retarded as *Atkins* defines that condition.'" Appendix at 10, 11-12 (quoting *Simpson*, 490 F.3d at 1035). The district court was not free to assess, as it did, whether Sasser's pleaded allegations and evidentiary proffer actually were sufficient to warrant a hearing or relief under § 2254(e)(2), or to require Sasser to expand the record with more information to convince the court a hearing was necessary. In the Eighth Circuit's view, "*Simpson* expressly requires an *Atkins* evidentiary hearing, not some other type of 'remand procedure' crafted by the district court" for post-*Atkins* claims of mental retardation. Appendix at 12.

The court also rejected the State's alternative argument based on the limitations issue. Appendix at 13-15 & n.7. First, it adopted Sasser's erroneous contention that the State had not raised the issue at any time prior to the final adjudication in district court. Appendix at 14 & n.8. Then, despite the mandatory language in § 2244(b)(4), the court relied on *Day v. McDonough*, 547 U.S. 198 (2006), to hold that the district court was not obligated to consider the timeliness of a claim before adjudicating its merits in a second or successive proceeding. Appendix at 15. Finally, the Eighth Circuit held that federal-court "discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level," Appendix at 15, and, therefore, it refused to decide whether the fully-briefed limitations issue provided a basis to affirm. Moreover, it did not direct

the district court to consider the issue on remand pursuant to 28 U.S.C. § 2244(b)(4).

The State sought rehearing en banc, and the Eighth Circuit denied the request by a vote of 5 to 4. Two judges did not participate in the vote, and Judge Colloton specifically dissented from the denial of rehearing en banc on the same ground as he had in *Simpson* – that the court should have agreed to review the question of whether Sasser's previous failure to pursue relief under the State's pre-existing remedy precluded the court from relying on the claim's previous unavailability to excuse the procedural default under the reasoning of *Dugger v. Adams*, 489 U.S. 401 (1989). Appendix at 50-52. The Eighth Circuit issued its mandate on April 21, 2009, and on June 3, 2009, granted the State's motion to recall and stay the mandate.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit and the Fourth Circuit interpret 28 U.S.C. § 2254(e)(2)'s opening clause, which inquires whether "the applicant has failed to develop the facts of the claim during State court proceedings," in a manner that voids 28 U.S.C. § 2254(e)(2)(B), and is directly contrary to *Williams v. Taylor*, 529 U.S. 420 (2000).

1. The Eighth Circuit rejected the district court's application of 28 U.S.C. § 2254(e)(2) to Sasser's *Atkins*

claim, reasoning, as it did in *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied*, 128 S.Ct. 1226 (2008), that, because the new constitutional rule announced in *Atkins* was not available during State court proceedings, Sasser "can hardly be said to have lacked diligence in developing the factual basis of that claim in state court." Appendix at 8 (quoting *Simpson*, 490 F.3d at 1035). By doing so, the Eighth Circuit joins the Fourth Circuit, *see Walker v. True*, 399 F.3d 315, 326-27 (4th Cir. 2005), in interpreting § 2254(e)(2)'s opening clause in a manner that examines a petitioner's diligence according to the availability of the legal basis for the claim, rather than, as this Court directed in *Williams v. Taylor*, 529 U.S. 420, 433 (2000), the material facts underlying it. Because that interpretation voids § 2254(e)(2)(B) in cases involving claims relying on previously unavailable rules of constitutional law, and that outcome is patently contrary to Congress's intent, this Court should grant certiorari to address the Court of Appeals' flawed construction of § 2254(e)(2).

2. A "cardinal principle" of statutory construction is "to give effect, if possible, to every clause and word of a statute," *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted), and the Eighth Circuit and the Fourth Circuit's interpretation of § 2254(e)(2)'s opening clause violates that principle by voiding § 2254(e)(2)(B) in cases where Congress clearly intended it to apply – those in which the factual basis of a claim was not developed during

State court proceedings because "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). According to the Court of Appeals' interpretation, petitioners who failed to develop the factual basis of a claim relying on a previously unavailable rule of constitutional law would never come within the ambit of § 2254(e)(2) at all, and, thus, would not be required to also show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

3. The Court of Appeals' construction of § 2254(e)(2) is flawed because it extends the diligence inquiry outlined in *Williams v. Taylor*, 529 U.S. 420, beyond its intended limits. While this Court held in *Williams* that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," 529 U.S. at 432, it did not interpret the opening clause's diligence inquiry to account for the availability of new constitutional rules during State court proceedings. Indeed, the Court limited the diligence inquiry to examining the extent of a petitioner's effort to develop the material facts of his claim, as opposed to whether the lack of any effort should be excused because the legal basis for the claim, or the facts themselves, were

ultimately unavailable. *Williams*, 529 U.S. 435 ("Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court, it does not depend . . . upon whether those efforts could have been successful"). Rather than in the opening clause of § 2254(e)(2), the circumstances excusing a lack of effort to develop the facts underlying a claim are accounted for in § 2254(e)(2)(A)(i) and (A)(ii). As this Court recognized, "in [those] two parallel provisions Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or factual basis of the claims did not exist at the time of the state-court proceedings." *Williams*, 529 U.S. at 436. The Courts of Appeals in the Eighth and Fourth Circuits, however, conflate § 2254(e)(2)'s opening clause with § 2254(e)(2)(A)(i) by interpreting its diligence inquiry in a manner that examines the availability of the legal basis for the petitioner's claim. By construing § 2254(e)(2)'s opening clause in that manner, the Eighth Circuit in *Sasser*, and the Fourth Circuit in *Walker*, directly conflict with *Williams*, as well as the plain language of § 2254(e)(2).

4. As a result of its flawed construction of § 2254(e)(2)'s opening clause, the Eighth Circuit has held, in further conflict with *Williams*, that Sasser, who acknowledged that his state trial and post-conviction counsel failed to diligently develop available facts underlying his *Atkins* claim in state court,

did not come within the ambit of § 2254(e)(2), and, thus, was entitled to an evidentiary hearing despite his failure to satisfy § 2254(e)(2)(B). Because it focused § 2254(e)(2)'s diligence inquiry exclusively on the availability of the legal basis for Sasser's *Atkins* claim, the Eighth Circuit dismissed as "irrelevant" the availability of the same claim under Arkansas law, *see* Ark. Code Ann. § 5-4-618, which, if raised during State court proceedings, most assuredly would have developed the facts underlying Sasser's purportedly novel Eighth Amendment claim. *See Atkins v. Virginia*, 536 U.S. 304, 314, 317, n.22 (2002) (leaving the task of developing appropriate ways to enforce the Eighth Amendment prohibition to the states, and noting that existing statutes, including Arkansas's, generally conform to the clinical definitions of mental retardation). Indeed, Sasser acknowledged as much in his successive application, asserting that "there [was] ample evidence of [his] mental retardation that was available at the time of the original trial and sentencing proceedings," and, consequently, his trial counsel was ineffective for failing to develop evidence to support his Eighth Amendment claim, as well as a mitigating circumstance during the penalty phase of his trial. *Sasser v. Norris*, No. 00-4036, Docket Entry No. 48, Petitioner's Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief, at 13-15, 16-23 (W.D. Ark. Sept. 3, 2004); *see also* Appendix at 12 (observing that Sasser's ineffective-assistance-of-counsel claim "flatly contradicts" his argument that his failure to pursue the retardation issue should be excused because it was previously

unavailable). Sasser further asserted that, in light of the information available, his post-conviction counsel was "ineffective" for failing to "meaningfully raise and litigate" his Eighth Amendment claim, as well as his ineffective-assistance-of-counsel claim. *Sasser v. Norris*, No. 00-4036, Docket Entry No. 48, Petitioner's Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief, at 15, 23 (W.D. Ark. Sept. 3, 2004). Sasser acknowledged, in other words, the precise lack of diligence that this Court held would trigger application of § 2254(e)(2)'s opening clause, *Williams*, 529 U.S. at 432, 438-40, and, yet, because of the Eighth Circuit's flawed construction, he need not, as other negligent petitioners must, show that he can satisfy § 2254(e)(2)(B). Because that result is in direct conflict with *Williams* and the statute, this Court should grant certiorari to correct the Court of Appeals' flawed construction of § 2254(e)(2)'s opening clause.

II. The Eighth Circuit's decision that the district court must hold an evidentiary hearing on Sasser's *Atkins* claim based solely on the facts alleged in the petition is directly contrary to *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Habeas Corpus Cases Under Section 2254.

1. Compounding its error regarding the construction of § 2254(e)(2)'s opening clause, the Eighth Circuit remanded the case to the district court for an evidentiary hearing based solely on the facts alleged

in Sasser's petition, rejecting the district court's previous attempts to expand the record to determine whether Sasser's *Atkins* claim actually warranted a hearing. According to the Eighth Circuit, Sasser was entitled to a hearing "simply by virtue of 'alleging that he is mentally retarded as *Atkins* defines that condition'" Appendix at 11-12 (quoting *Simpson*, 490 F.3d at 1035), and, despite the district court's apparent desire that he do so, Sasser was "not obligated to expand the record with additional evidence showing that he was entitled to an evidentiary hearing." Appendix at 11. Because that decision directly conflicts with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Habeas Corpus Cases Under Section 2254, this Court should grant certiorari to address the Eighth Circuit's disregard for the district court's authority to expand the record to determine whether Sasser's *Atkins* claim warrants an evidentiary hearing.

2. On September 28, 1976, Congress adopted the Rules Governing Habeas Corpus Cases Under Section 2254, making them applicable to all petitions filed "on or after February 11, 1977." Act of Sept. 28, 1976, PL 94-426, 90 Stat. 1334 (1976). Among them, Rule 6 authorizes discovery "for good cause," 28 U.S.C. § 2254 Rule 6(a); Rule 7 allows district courts to "direct the parties to expand the record by submitting additional materials relating to the petition," 28 U.S.C. § 2254 Rule 7(a); and Rule 8 requires district courts to "review the answer, any transcripts and records of state-court proceedings, and *any materials*

submitted under Rule 7 to determine whether an evidentiary hearing is warranted." 28 U.S.C. § 2254 Rule 8(a) (emphasis added). In *Allison*, moreover, this Court recognized that not "every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing," 431 U.S. at 80, and, in addition to the summary judgment procedure available under Rule 56 of the Federal Rules of Civil Procedure, Rules 6 and 7 collectively authorize district courts to "employ a variety of measures in an effort to avoid the need for an evidentiary hearing." *Id.* at 81; *see also Porter v. Gramley*, 112 F.3d 1308, 1317-18 (7th Cir. 1997) (observing that, in light of *Allison* and the Habeas Rules, *Townsend v. Sain*'s requirement of a hearing on disputed facts "cannot be taken literally") (internal quotations marks omitted).

3. Nevertheless, as though it was unaware of these authorized measures, the Eighth Circuit dismissed the district court's use of them as "'a remand procedure' crafted by the district court," and held that because the facts that Sasser asserted in support of his *Atkins* claim could survive dismissal, the district court *must* hold an evidentiary hearing to adjudicate the claim. That holding is plainly contrary to *Allison* and the Rules Governing Habeas Corpus Cases Under Section 2254, and, thus, even if the Court agrees that § 2254(e)(2) does not apply to Sasser's *Atkins* claim, it should nevertheless grant certiorari to correct the Eighth Circuit's blatant disregard of a district court's authority to expand the record to determine whether an evidentiary hearing is warranted.

III. In conflict with the Sixth Circuit and *Day v. McDonough*, 547 U.S. 198 (2007), the Eighth Circuit's decision evades the mandatory statute of limitations imposed on second and successive petitions by 28 U.S.C. § 2244(b)(4).

1. In conflict with AEDPA's plain restriction on the district court's authority to adjudicate the merits of an untimely, second claim, the Eighth Circuit held that when such a claim satisfies 28 U.S.C. § 2244(b)(2)(A), a district court has the option, but no duty, to consider the timeliness of the petition before it must hold a hearing on the claim and adjudicate the merits, unless the State raised the limitations issue in the district court. Having adopted Sasser's erroneous assertion that the State did not raise the limitations issue at any time before adjudication in the district court, the Eighth Circuit further held, in conflict with *Day v. McDonough*, 547 U.S. 198, 206 (2006), that because the State had not raised the limitations issue at any point in the district court, the appellate court did not have discretion to consider the fully-briefed limitations issue as an alternative basis to affirm the decision of the district court.

2. It is a settled rule that statutory interpretation begins with the plain language of the statute. *E.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In plain terms, AEDPA requires in 28 U.S.C. § 2244(b)(4) that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed

unless the applicant shows that the claim satisfies the requirements of this section." In contrast, 28 U.S.C. § 2244(b)(3)(C) permits a court of appeals to authorize the filing of a second or successive application "only if it determines that the application makes a prima facie showing that [it] satisfies the requirements of this subsection." The intended reference in § 2244(b)(4) to the entirety of "section" 2244, in contrast to § 2244(b)(3)(C)'s reference to "subsection" (b), is obvious. A district court considering a second or successive petition must dismiss the petition unless the petitioner satisfies the entirety of "section" 2244, including the statute of limitations in subsection (d)(1). Its duty to do so, moreover, is mandatory, not discretionary. Construing similar mandatory language in 28 U.S.C. § 2244(b)(2)(A), this Court said the statute "requires a district court to dismiss a claim . . . unless, as relevant here, the applicant 'shows' that the 'claim [satisfies § 2244(b)(2)(A)]' " and it further noted that "to survive dismissal in district court, the applicant must actually 'sho[w]' that that the claim satisfies the standard." *Tyler v. Cain*, 533 U.S. 656, 660-61 & n.3 (2001).

3. When Congress conditions the federal courts' authority to adjudicate a class of cases on the satisfaction of a limitations statute, as it has in 28 U.S.C. § 2244(b)(4), a litigant may not rely on the forfeiture rule to excuse his lack of compliance with the statute. *See Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2364-66 (2007) (considering courts' power to extend time to file notice of appeal and reasoning that

because Congress, as opposed to a court rule, forbade federal courts from adjudicating an otherwise legitimate class of cases after a certain period of time had elapsed from final judgment, the limitation was more than a simple claim-processing rule subject to forfeiture). *See also Day*, 547 U.S. at 212-13 (Scalia, J., dissenting) (explaining that where the forfeiture rule is inconsistent with the habeas corpus statute, such as where the limitations statute is given "further qualification" or "further elaboration," the forfeiture rule will not apply).

4. The Eighth Circuit's view that 28 U.S.C. § 2244(d)(1) is not encompassed by the mandatory requirements of 28 U.S.C. § 2244(b)(4) and, therefore, is subject to the modified forfeiture rule of *Day*, 547 U.S. 198, conflicts with the Sixth Circuit's view that § 2244(b)(4) encompasses § 2244(d)(1). *See In re McDonald*, 514 F.3d 539, 543-44 (6th Cir. 2008) (holding the limitations issue is not within the purview of the courts of appeals when making an authorization decision pursuant to § 2244(b)(3)(C), but is for the district court to consider pursuant to § 2244(b)(4) following authorization of the claim). It further contradicts the plain text and structure of the statute and is incompatible with Congress's recognized intent, through AEDPA, to "greatly restrict[ ] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler*, 533 U.S. at 661; *see also Felker v. Turpin*, 518 U.S. 651, 658 (1996) (noting AEDPA's second-or-successive limitations "impose new conditions on [the]

authority to grant relief"). With its enactment of 28 U.S.C. § 2244(b)(4), Congress made it a petitioner's burden in a successive case to affirmatively demonstrate that his petition satisfies the limitations period or else suffer mandatory dismissal. In successive cases, the limitations issue is not subject to forfeiture, but rather is one of the "new restrictions on successive petitions [that] constitute . . . a restraint on . . . 'abuse of the writ.'" *Id.* at 664. These restrictions were "intended to reduce the universe of cases in which a habeas petition may go forward on a second or successive petition." *In re Minarik*, 166 F.3d 591, 600 (3d Cir. 1999) (referring to substantive restrictions in § 2244(b)(2)). Consideration of the limitations issue, thus, is not only mandatory, but as it relates to the evolutionary abuse-of-the-writ doctrine, it is "preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself." *Price v. Johnston*, 334 U.S. 266, 287 (1948), *quoted in McCleskey v. Zant*, 499 U.S. 467, 496 (1991).

5. Despite the structure and plain language of the statute, decisions of the lower federal courts reflect confusion about how 28 U.S.C. § 2244(d)(1) applies in second or successive cases. The Eighth Circuit is the first court of appeals to decide a district court has no obligation to consider a limitations issue in a second or successive proceeding if it is not raised by the State before final adjudication. The Sixth Circuit, on the other hand, has held that the limitations statute falls squarely within the scope of the district court's duties under 28 U.S.C. § 2244(b)(4).

McDonald, 514 F.3d at 543-44. The Third, Fifth, Seventh, Ninth, and Tenth Circuits have recognized that a district court's duty to dismiss under subsection (b)(4) is mandatory and is conditioned on the habeas petitioner's satisfaction of the statute, but so far these Circuits have considered the requirement of subsection (b)(4) only as it applies to the substantive standard in 28 U.S.C. § 2244(b)(2) – which contains its own mandatory dismissal requirement independent of subsection (b)(4). *Goldblum v. Klem*, 510 F.3d 204, 217 (3d Cir. 2007), *cert. denied sub nom. Goldblum v. Kerestes*, 129 S.Ct. 106 (2008); *Brown v. Lensing*, 171 F.3d 1031, 1032 & n.8 (5th Cir. 1999); *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164-65 (9th Cir. 2000) (per curiam); *Ochoa v. Sirmons*, 485 F.3d 538, 542 n.5 (10th Cir. 2007) (per curiam). *See also Tyler*, 533 U.S. at 660-61 & n.3 (construing similar language contained in § 2244(b)(2), itself). And finally, the Fifth and Eleventh Circuits also permit the limitations issue to be considered *sua sponte* by the court of appeals as part of the authorization process for second or successive petitions, despite the contrast in language between subsections (b)(3)(C) and (b)(4). *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006); *In re Lewis*, 484 F.3d 793, 796 n.3 (5th Cir. 2007) (per curiam); *but see In re Salazar*, 443 F.3d 430, 434 n.2 (5th Cir. 2006) (per curiam) (questioning whether court of appeals has statutory authority to consider timeliness of underlying claim as part of decision to allow applicant to file successive petition). Because the Eighth Circuit's decision is in

conflict with the plain terms of the statute and with the Sixth Circuit's decision in *McDonald*, and because the lower federal court decisions are in disarray about AEDPA's distribution of responsibilities of the courts and the parties under § 2244(b) and about the scope of § 2244(b)(4), this Court should grant certiorari to settle these issues and to correct the Eighth Circuit's error.

6. Even if the Eighth Circuit is correct in its view that § 2244(b)(4) has no effect on how the limitations period in § 2244(d)(1) is to be treated for a second petition, its decision that it had no discretion to consider the fully-briefed limitations issue as a basis for affirmance conflicts with this Court's decision in *Day* and the Seventh Circuit's decisions in *Cotton v. Grigsby*, 456 F.3d 727, 731 (7th Cir. 2006) (recognizing *Day* and *Granberry v. Greer*, 481 U.S. 129 (1987) afforded courts of appeals discretion to consider limitations issue raised for first time on appeal in first-habeas case), and *Jones v. Hulick*, 449 F.3d 784, 787 (7th Cir. 2006) (recognizing it could consider fully-briefed limitations issue raised for first time on appeal pursuant to *Day* and the rule that a court may affirm on any ground, even one not considered below). In *Day*, this Court approved of a modified rule of forfeiture for the limitations defense, allowing federal courts the discretion to raise the issue *sua sponte* like other threshold barriers to relief such as exhaustion, procedural default, non-retroactivity, and abuse of the writ. While *Day* specifically approved of the situation in which a district court, rather than a court of appeals, addressed the issue

sua sponte, it found support for its holding by looking to, *inter alia*, *Granberry v. Greer*, 481 U.S. 129 (1987) and *Caspari v. Bohlen*, 510 U.S. 383 (1994). In *Granberry*, the Court held federal courts of appeals have discretion to consider the threshold issue of exhaustion for the first time on appeal. In *Bohlen*, the Court emphasized that since the non-retroactivity rule is a threshold bar to relief, this Court had discretion to consider it if the State did not raise it. *Granberry*, 510 U.S. at 389. Significantly, it noted that "if the State does argue [it,]" – as was the case here – "the court *must* apply [the rule] before considering the merits of the claim." *Id.* Inasmuch as *Day*'s holding rests on the premise of federal-court discretion recognized in, *inter alia*, *Granberry* and *Bohlen*, the Eighth Circuit's decision that it had no discretion to consider the limitations issue is directly contrary to *Day*.[2] And, because

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[2] That the Eighth Circuit based its ruling on the State's failure to raise the limitations issue is especially troubling, considering the manner in which the Eighth Circuit made its authorization decision. It did so by issuing a limited order of remand restricting the question to "whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution." Appendix at 49. In the alternative, it granted permission to file a successive petition. *Id.* It is apparent that the district court felt constrained by the mandate rule to adjudicate the *Atkins* claim, rather than to consider any threshold review required by 28 U.S.C. § 2244(b). It recognized the petition as a successive one, but did not review the *Atkins* claim pursuant to the successive-petition provisions in § 2244(b). Rather, it specifically followed the limited remand order when it analyzed the *Atkins* claim, yet it readily applied § 2244(b) and writ-abuse principles to the other claims Sasser raised in addition to the

(Continued on following page)

the limitations issue not only was raised in the district court, but also was raised and fully briefed in the Eighth Circuit, the court's refusal to consider this threshold bar to relief as an alternative basis for affirmance contravened *Bohlen*, and the black-letter principle that "[t]he prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The Eighth Circuit violated these principles and the Congressional restrictions on federal-court authority by remanding Sasser's second habeas case to the district court for a mandatory evidentiary hearing and adjudication on the merits without requiring preliminary consideration of the limitations issue.

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authorized *Atkins* claim. *Compare* Appendix at 24-32 *with* 21-22, 33-37. And, upon considering the State's argument that § 2244(b) and § 2244(d) foreclosed relief and therefore precluded discovery, the district court rejected the argument stating that discovery was necessary to allow Sasser an opportunity to present facts to support relief or a hearing. *Sasser v. Norris*, No. 00-4036, Docket Entry No. 64, Order at 2-3 (W.D. Ark. Feb. 13, 2006). While review of the Eighth Circuit's grant of authorization to file is neither challenged nor subject to review here as a result of 28 U.S.C. § 2244(b)(3)(E), the facts surrounding the authorization may indicate why the district court did not address the limitations issue despite the fact that it was raised, and they are further indication of the Eighth Circuit's flawed understanding of the proper construction and application of § 2244(b), § 2244(d), and § 2254(e) in cases that involve new rules of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2385

Andrew SASSER, Appellant, v. Larry Norris, Director, Arkansas Department of Corrections, Appellee.	* * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas.

Submitted: September 25, 2008
Filed: January 23, 2009

Before RILEY, BRIGHT, and MELLOY, Circuit Judges.

RILEY, Circuit Judge.

Andrew Sasser (Sasser) appeals the district court's denial of his Second Supplemental and Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Sasser argues the district court erred by ruling Sasser is not entitled to an evidentiary hearing on his claims that his death sentence (1) violates his Eighth Amendment rights

because he is mentally retarded, and (2) should be vacated because his trial counsel was ineffective for failing to investigate and develop the mental retardation issue at trial. We reverse and remand to the district court for an *Atkins*[1] evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim. We affirm the district court's denial of relief on Sasser's ineffective assistance of counsel claim.

I. BACKGROUND

Sasser is an Arkansas state prisoner sentenced to death in 1994 for the July 1993 brutal murder of Jo Ann Kennedy, a convenience store clerk. In 1995, the Arkansas Supreme Court affirmed Sasser's conviction and sentence, *Sasser v. Arkansas,* 902 S.W.2d 773, 779 (Ark. 1995), and in 1999 affirmed the denial of Sasser's application for state post-conviction relief, *Sasser v. Arkansas,* 993 S.W.2d 901, 903 (Ark. 1999). On July 7, 2000, Sasser filed a petition for writ of habeas corpus in the United States District Court for the Western District of Arkansas challenging his conviction and sentence. Sasser later filed an amended petition. The Arkansas district court denied Sasser's petition on May 28, 2002.

On June 20, 2002, the United States Supreme Court issued its decision in *Atkins,* "[c]onstruing and applying the Eighth Amendment in the light of our

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

'evolving standards of decency,'" and concluding execution of mentally retarded persons is cruel and unusual punishment in violation of the Eighth Amendment. 536 U.S. at 321 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405 (1986)). On June 27, 2002, Sasser filed his notice of appeal from the district court's denial of his habeas petition. On June 18, 2003, Sasser filed a motion in this court styled "Appellant's Supplemental Motion to Remand to the District Court or in the Alternative Motion to File a Second or Successive Habeas Corpus Petition." Sasser sought remand so the district court could consider his claim that, under *Atkins,* he is mentally retarded and ineligible for the death penalty. This court granted Sasser's motion to remand on August 15, 2003, stating, "[t]he issue on remand is limited to the question of whether Mr. Sasser is mentally retarded and whether pursuant to [*Atkins*], the Eighth Amendment prohibits his execution." We also explained the remand would be treated as a successive habeas petition rather than as an amendment to Sasser's earlier petition, declaring, "[t]o the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted."

On August 29, 2003, the government filed a motion for rehearing, arguing Sasser had not yet exhausted his mental retardation claim in Arkansas state court. On March 9, 2004, this court issued an amended judgment directing the district court to first determine whether Sasser had exhausted his claim in

Arkansas state court and, if the district court determined Sasser had a viable state court remedy, to consider holding the remanded petition in abeyance pending resolution of the claim by the Arkansas state courts.

On remand, Sasser filed a motion for extension of time, which the district court granted, and on September 3, 2004, Sasser filed a "Second Supplemental and Amended Petition" setting forth his mental retardation claim. Sasser also presented several other claims, including a claim his attorney was constitutionally ineffective for failing to investigate and develop the mental retardation issue at Sasser's trial. On August 22, 2005, the United States Supreme Court denied certiorari in *Engram v. Arkansas*, 200 S.W.3d 367 (Ark. 2004), thereby establishing Sasser did not have a viable Arkansas state court remedy.[2]

On November 22, 2005, the district court entered a scheduling order, stating, "the Court has determined that any outstanding issues concerning the presentation of evidence on the issue of mental retardation need to be resolved in a timely fashion." The

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[2] In *Engram*, the Arkansas Supreme Court held the defendant was not entitled to have a mandate affirming his death sentence recalled based on the Supreme Court's subsequent decision in *Atkins*. The court reasoned the defendant could have raised the mental retardation issue at trial by availing himself of an Arkansas statute in effect at the time of trial that prohibited the execution of mentally retarded individuals. *Engram*, 200 S.W.3d at 371.

district court ordered any motions regarding mental evaluations of Sasser be filed by January 13, 2006. On January 13, 2006, Sasser filed a discovery motion indicating he needed to prepare a complete social history so he could identify which experts would be needed to evaluate him. Sasser also requested permission to serve a subpoena duces tecum on various entities and individuals. The district court granted Sasser's motion to conduct discovery, stating discovery would "allow facts to be presented to the Court to assist with the question of whether an evidentiary hearing is warranted." On June 14, 2006, the district court ordered that discovery be completed by July 31, 2006, and any additional motions (including motions for an evidentiary hearing) be filed by August 31, 2006. The court warned, "Petitioner's failure to file the above mentioned motions will constitute notice to the Court that Petitioner does not intend to present additional evidence regarding his mental retardation claim." Sasser filed no additional motions.

On January 9, 2007, without holding an evidentiary hearing, the district court denied Sasser's Second Supplemental and Amended Petition in its entirety. The district court determined Sasser's claim that his death sentence violates the Eighth Amendment was procedurally defaulted because Sasser did not raise the issue in state court. The district court found Sasser did not satisfy the "cause and prejudice" exception to procedural default because he could have raised the retardation issue during trial under an Arkansas statute prohibiting execution of mentally

retarded persons. The district court also found Sasser did not satisfy the "actual innocence" exception to procedural default because he failed to present sufficient evidence of his mental retardation.

With respect to Sasser's ineffective assistance of counsel claim, the district court concluded, "[t]he Eighth Circuit limited the issue on remand to 'the question of whether Mr. Sasser is mentally retarded and whether pursuant to [*Atkins*], the Eighth Amendment prohibits his execution'. . . . [Therefore] [t]he only proper claim before the Court is whether Petitioner is mentally retarded and whether his execution is prohibited by the Eighth Amendment."

On appeal, Sasser maintains his mental retardation claim was not procedurally defaulted by his failure to raise the claim in Arkansas state court. Sasser argues he is entitled to an evidentiary hearing to present evidence in support of his claim that he is mentally retarded and the Eighth Amendment prohibits his execution. Sasser also contends the district court erred by denying an evidentiary hearing on Sasser's claim that his trial counsel was ineffective for failing to investigate and present evidence of Sasser's mental retardation during the penalty phase of Sasser's trial.

II. DISCUSSION

A. Eighth Amendment Claim

"We review a district court's finding of procedural default *de novo*." *Schawitsch v. Burt,* 491 F.3d 798, 802 (8th Cir. 2007) (citing *Kerns v. Ault,* 408 F.3d 447, 449 (8th Cir. 2005)).

Sasser contends this court's decision in *Simpson v. Norris,* 490 F.3d 1029 (8th Cir. 2007), requires the district court hold an evidentiary hearing on the merits of Sasser's mental retardation claim. We agree. In *Simpson,* the district court denied the petitioner an evidentiary hearing on his *Atkins* claim in part "because 'before trial, at trial, or in his post-conviction petition,' [the petitioner] did not present a mental retardation defense to the death penalty (a defense that was available to him under state law, *see* Ark. Code. § 5-4-618)." *Id.* at 1034. The *Simpson* petitioner argued the district court erred by holding his Eighth Amendment mental retardation claim under *Atkins* was defaulted by an omission that occurred before *Atkins* was decided. *Id.* at 1032. We reversed, explaining,

> We think, contrary to the district court's holding, that the availability of a similar claim under Arkansas law is irrelevant to our consideration here: Mr. Simpson is raising a previously unavailable federal claim, and that claim is separate and distinct. . . . Since *Atkins* created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded, Mr.

> Simpson can hardly be said to have lacked diligence in developing the factual basis of that claim in state court.

Id. at 1035.

We further explained, "[w]here the facts are in dispute, the federal court in habeas corpus *must hold an evidentiary hearing* if the habeas applicant did not receive a full and fair evidentiary hearing in state court." *Id.* (citing *Townsend v. Sain*, 372 U.S. 293 (1963)) (emphasis added). "Mr. Simpson has alleged that he is mentally retarded as *Atkins* defines that condition, which would entitle him to relief, and that matter remains in dispute." *Id.*[3] We therefore directed the district court to "give Mr. Simpson the chance to develop the factual basis of his claim *and present it at an evidentiary hearing*." *Id.* (emphasis added). We recently reaffirmed our *Simpson* holding. *See Jackson v. Norris*, 256 Fed. Appx. 12 (8th Cir. 2007) (per curiam) (unpublished).

Like the petitioner in *Simpson*, the district court in Sasser's case concluded Sasser's *Atkins* claim was procedurally defaulted because Sasser did not raise the issue in state court under state law, and did not satisfy the "cause and prejudice" exception to procedural default because he could have raised the retardation issue under the same Arkansas statute

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[3] *Atkins* actually does not define mental retardation, leaving the development of the new constitutional restriction to the states. *Atkins*, 536 U.S. at 317.

prohibiting execution of mentally retarded persons. This reasoning is now invalid under *Simpson,* 490 F.3d at 1035 (declaring, "the availability of a similar claim under Arkansas law is irrelevant to our consideration here").

The district court further found Sasser did not satisfy the "actual innocence"[4] exception to procedural default because he failed to present sufficient evidence of his mental retardation. This reasoning is contrary to *Simpson,* which found Simpson's pleading adequate when Simpson "alleged that he is mentally retarded as *Atkins* defines that condition" in order to be allowed to present evidence in support of his claim at an evidentiary hearing. *Id.* at 1035. Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy's murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's

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[4] A petitioner is "actually innocent" of the death penalty where he is ineligible for the death penalty. *See Sawyer v. Whitley,* 505 U.S. 333, 345 (1992).

house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. While *Simpson* may not mandate an evidentiary hearing in every conceivable set of circumstances, there is no question the allegations in Sasser's petition are as adequate as *Simpson*'s pleading threshold where the petitioner "alleged that he is mentally retarded as *Atkins* defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim. *Id.* Nothing in Sasser's case precludes the need for an *Atkins* evidentiary hearing.

The government attempts to distinguish *Simpson* in two ways. First, the government argues Sasser's petition should be subject to more stringent standards because, unlike the first-time habeas petitioner in *Simpson,* Sasser's petition is a successive habeas petition.[5] This distinction has no effect on whether Sasser is entitled to an evidentiary hearing. The government contends Sasser's petition fails to meet 28 U.S.C. § 2244(b)(2)(A)'s requirement that a successive petition asserting claims not presented in a prior

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[5] Sasser argues his petition should be treated as an amendment to his first habeas petition rather than a successive petition. This Court expressly stated in its remand order, "[t]o the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted." Thus, we will treat Sasser's petition as a successive habeas petition.

application be dismissed, unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." As Sasser correctly notes, we expressly recognized in *Simpson*, "*Atkins* created a *previously unavailable* claim based on the unconstitutionality of executing the mentally retarded." *Simpson*, 490 F.3d at 1035 (emphasis added). Because *Atkins* teaches us Sasser's future execution would violate the Eighth Amendment if Sasser were mentally retarded, the application of *Atkins* to Sasser's petition actually is prospective. Sasser meets the requirement of § 2244(b)(2)(A).

The government also attempts to distinguish *Simpson* by arguing, unlike the petitioner in *Simpson*, the district court afforded Sasser a "remand procedure." Sasser failed to comply with the district court's directive that any additional motions (including motions for an evidentiary hearing) be filed by August 31, 2006. The district court warned, "Petitioner's failure to file the above mentioned motions will constitute notice to the Court that Petitioner does not intend to present additional evidence regarding his mental retardation claim." Sasser was not obligated to expand the record with additional evidence showing he was entitled to a hearing, nor was he obligated to file another motion requesting a hearing – Sasser already requested a hearing in his "Second Supplemental and Amended Petition." *Simpson* explains Sasser is entitled to a hearing simply by virtue of "alleg[ing] that he is mentally retarded as *Atkins*

defines that condition." *Simpson,* 490 F.3d at 1035. Given the circumstances and factual allegations in Sasser's case, *Simpson* expressly requires an *Atkins* evidentiary hearing, not some other type of "remand procedure" crafted by the district court. *Id.* We therefore reverse and remand to the district court for an evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim.

B. Ineffective Assistance of Counsel

Sasser asserts the district court erred by concluding his ineffective assistance of counsel claim was not properly before the court. Sasser claims he is entitled to a hearing on the issue of whether his counsel was ineffective for failing to investigate and develop Sasser's alleged mental retardation at trial. This argument flatly contradicts Sasser's Eighth Amendment argument. On one hand, Sasser argues his failure to pursue the retardation issue should be excused because the claim was "previously unavailable" until *Atkins.* On the other hand, Sasser's [sic] argues his trial counsel was constitutionally ineffective for failing to pursue what *Atkins* characterizes as a "previously unavailable" claim. Trial counsel's failure to anticipate new law does not constitute ineffective assistance of counsel. *See Schawitsch,* 491 F.3d at 804 (citing *Parker v. Bowersox,* 188 F.3d 923, 929 (8th Cir. 1999)).

Regardless of the merit of Sasser's ineffective assistance of counsel claim, the district court properly

concluded Sasser's ineffective assistance of counsel claim was not properly before it. We expressly limited the issue in our prior remand "to the question of whether Mr. Sasser is mentally retarded and whether pursuant to [*Atkins*], the Eighth Amendment prohibits his execution." Sasser cites *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs.*, 364 F.3d 925, 931 (8th Cir. 2004) for the proposition that the district court may "decide any issue not expressly or impliedly disposed of on appeal." *Id.* at 931 (quotation marks and citation omitted). *Pediatric Specialty Care* is not on point. In Sasser's case, there were no lingering issues we failed to dispose of on appeal. We expressly limited the district court to consideration of *one issue*. By doing so, we impliedly prohibited the district court's consideration of *any other issue*. Our remand order did not give Sasser license to raise whatever other claims he wished, so long as those claims had some relationship to his alleged mental retardation. The district court correctly decided Sasser's ineffective assistance claim was not properly before it.

C. Statute of Limitations

The government argues, for the first time on appeal, that Sasser's successive petition is barred by the statute of limitations. The statute at issue, 28 U.S.C. § 2244(d)(1)(C), provides,

> [a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the

> judgment of a State court. The limitation period shall run from the latest of [various events, including] the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.][6]

The statute of limitations in Sasser's case began to run on June 20, 2002, when *Atkins* was decided. Sasser filed his application in this court for authorization to file a successive habeas petition on June 19, 2003, less than one year after *Atkins*. However, Sasser did not actually file his successive habeas petition in the district court until September 3, 2004.[7]

Sasser protests the government is not entitled to raise the statute of limitations issue for the first time on appeal.[8] In its brief, the government offers no justification for, or even acknowledgment of, its failure to raise the statute of limitations issue at any time before its appellate brief. "The [Federal] Rules

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[6] The parties agree *Atkins* is retroactively applicable to cases on collateral review.

[7] We express no opinion on whether Sasser's petition was timely filed.

[8] The government mentioned the statute of limitations issue for the first time after the district court denied Sasser's successive petition in a footnote to the government's response to Sasser's motion to alter or amend the district court's judgment. The government did not argue Sasser's petition was time-barred until its appellate brief.

[of Civil Procedure] provide that [statute of] limitations defenses are forfeited unless pleaded in an answer or an amendment to the answer." *Barnett v. Roper,* 541 F.3d 804, 807 (8th Cir. 2008) (citing *Day v. McDonough,* 547 U.S. 198, 207 (2006)) (in turn citing Fed. R. Civ. P. 8(c), 12(b), and 15(a)) (addressing one-year statute of limitations in habeas case); *see also Trussell v. Bowersox,* 447 F.3d 588, 590 (8th Cir. 2006) (addressing the merits of a habeas petition because, while it was "doubtful that Trussell filed his petition within the one-year limitations period. . . . the statute of limitations [does not] constitute[ ] a jurisdictional bar to our review"). District courts may consider *sua sponte* the timeliness of a habeas petition, but because the statute of limitations defense is not regarded as jurisdictional, district courts are under no obligation to raise the issue *sua sponte. Day,* 547 U.S. at 202, 205 (citations omitted). The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level. *Barnett,* 541 F.3d at 807. Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited, and we will not address the defense any further.

III. CONCLUSION

We reverse and remand to the district court for an *Atkins* evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim. We affirm the district court's denial of relief on Sasser's ineffective assistance of counsel claim. If the mental

retardation issue returns to us on appeal after the district court adjudicates the merits, we direct that Sasser's mental retardation claim be consolidated with the other unresolved claims Sasser raised in his initial habeas petition.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

V. Civil No. 00-4036

LARRY NORRIS, Director of
Arkansas Department of
Corrections RESPONDENT

MEMORANDUM OPINION AND ORDER

(Filed Jan. 9, 2007)

Currently before this Court are Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief (Doc. 48), Respondent's Response (Doc. 51), Petitioner's Reply (Doc. 56), and Petitioner's Supporting Affidavit (Doc. 58). The Court finds that these matters are ripe for consideration. For the reasons stated in this Order, Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief (Doc. 48) is hereby **DENIED** in its entirety.

I. PROCEDURAL HISTORY

On May 4, 1994, a jury convicted Petitioner of capital murder and sentenced him to death for the homicide of Jo Ann Kennedy. Petitioner appealed his conviction to the Arkansas Supreme Court, where it was affirmed on July 17, 1995. *See Sasser v. State*, 902 S.W.2d 773 (Ark. 1995). Subsequently, Petitioner

sought post-conviction relief pursuant to Arkansas Rules of Criminal Procedure 37. After conducting an evidentiary hearing, the trial court denied Petitioner's Rule 37 petition, in September 1997. On July 8, 1999, the Arkansas Supreme Court affirmed the trial court's denial of post-conviction relief. *See Sasser v. State,* 993 S.W.2d 901 (Ark. 1991).

On July 7, 2000, Petitioner sought a writ of *habeas corpus* in federal court. (Doc. 3.) Throughout several pleadings, Petitioner presented eight (8) claims upon which he requested relief.[1] On May 23, 2002, this Court denied Petitioner's Petition for Writ of *Habeas Corpus.* (Doc. 30). On August 15, 2002, a Certificate of Appealability was issued for five (5) of Petitioner's claims. (Doc. 34).

While on appeal at the United States Court of Appeals for the Eighth Circuit (Eighth Circuit Court), Petitioner moved to have the case remanded to this Court to exhaust his mental retardation. On August 15, 2003, the Eighth Circuit Court entered a judgment, remanding the mental retardation issue to this Court, and granted the motion to file a successive petition. (Doc. 37). On August 27, 2003, this Court entered a Scheduling Order, stating that this Court would determine whether Petitioner is mentally retarded and whether his execution is prohibited, using the standard for mental retardation set forth

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[1] None of these claims addressed Petitioner's alleged mental retardation.

in Ark. Code Ann. § 5-4-618. (Doc. 40). Then, on March 9, 2004, the Eighth Circuit Court entered an Amended Judgement, revising the previously entered order and remanded the case to this Court for a determination of whether the mental retardation claim had been exhausted. (Doc. 44). The Judgment provided that if this Court were to conclude that Petitioner has a viable state court remedy, the Eight [sic] Circuit Court "invited this Court to determine whether "truly exceptional circumstances" involving "a consideration going beyond the running of the statute of limitations" exist. *Id.* (citation omitted).

On September 3, 2004, Petitioner filed a Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief. (Doc. 48). Petitioner raised a mental retardation claim, alleging that Petitioner's sentence to death by lethal injection violates the Eighth and Fourteenth Amendment. Petitioner also raised ineffective assistance of counsel claims; a claim that Petitioner's statement was taken in violation of the Fifth, Sixth, and Fourteenth Amendments; and a claim that Petitioner was incompetent during the trial and post-trial proceedings. Additionally, Petitioner incorporated his previously adjudicated eight claims, contained in his first *habeas* petition, all of which this Court had previously denied.

After a period of inactivity, on June 14, 2006, we entered a scheduling order to ensure progression of the case. (Doc. 65.) Completion of discovery was set for July 31, 2006 and motions regarding additional

information related to mental retardation (such as motions for leave to file a supplemental and/or amended petition, supplement the record, and request for an evidentiary hearing) were to be filed by August 31, 2006. The order stated that a failure to file motions regarding additional evidence by the date provided would constitute notice to the Court that Petitioner did not intend to present additional evidence regarding his mental retardation claim. *Id.* Petitioner failed to file any motions regarding the introduction of additional information to support the mental retardation claim.

II. FACTUAL BACKGROUND

The facts of this case have been recounted in detail at *Sasser v. Arkansas,* 902 S.W.2d 773 (Ark. 1995). To summarize, Petitioner was found guilty of killing Jo Ann Kennedy, a store clerk, by stabbing, cutting and causing blunt force head injuries during the commission or attempted commission of raping or kidnapping her.

III. PETITION

Before addressing the merits of the petition, we must first determine what type of petition is before the Court. There is a clear distinction between supplemental and/or amended petitions and successive petitions, with the latter having more restrictive rules governing what issues may be raised. Petitioner titled the petition currently before the Court as "Petitioner's

Second Supplemental and Amended Petition for Writ of *Habeas Corpus.*" However, a supplemental/amended petition is filed prior to the adjudication of the original petition, whereas a petition that asserts claims that have been adjudicated on their merits in a prior *habeas* petition and/or claims that could have been asserted in a prior *habeas* petition is a successive petition. *See* 28 U.S.C. §2244(b)(3)(A); *Vancleave v. Norris,* 150 F.3d 926, 928 (8th Cir. 1998) (citing *Stewart v. Martinez-Villareal,* 523 U.S. 637, 642-43 (1998) (the Court found that a claim raised in a prior petition that was dismissed as premature escapes the requirements of successive petitions); *Tyler v. Purkett,* 413 F.3d 696, 701 (8th Cir. 2005) ("Because the Rule 60(b) motion 'sought ultimately to resurrect the denial' of [petitioner's] earlier habeas petitions by asserting new claims of error in his state conviction and reasserting prior claims, however, it was properly construed as second or successive." (Citations omitted)).

In the case *sub judice,* the original petition has been adjudicated on its merits and Petitioner was in the process of appealing that decision when he raised the issue of mental retardation for the first time. The Eighth Circuit Court granted permission for Petitioner to file a successive petition, specifically to raise a mental retardation claim. (Doc. 37.) What has been titled Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* is actually a successive petition in both definition and function. Thus, for the reasons stated herein, the rules

governing the type of claims permitted in a successive petition will apply (see discussion under Section V. below).

IV. STANDARD OF REVIEW

A prisoner in state custody may petition a federal court for a writ of *habeas corpus* "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254 (1996). Specifically, Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides as follows:

> (d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1).

State courts should have a proper opportunity to address a petitioner's claims of constitutional error before those claims are presented to the federal court.

Coleman v. Thompson, 501 U.S. 722, 729-32 (1991). The requirement of exhaustion of remedies is satisfied if the petitioner has "fairly presented" his claims to the state court, thus preserving those claims for federal review, by properly raising both the factual and legal bases of the claim in state court proceedings, affording that court "a fair opportunity to rule on the factual and theoretical substance of [the] claim." *Krimmel v. Hopkins,* 56 F.3d 873, 876 (8th Cir. 1995). "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts." *McCall v. Benson,* 114 F.3d 754, 757 (8th Cir. 1997) (citations omitted).

Even when a petitioner has technically met the exhaustion requirement, the federal court may still be prevented from considering the federal *habeas* claim if it is procedurally defaulted. "A *habeas* petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman,* 501 U.S. at 729-32. Finally, a claim may be lost due to procedural default at any level of state court review: at trial, on direct appeal, or in the course of state post-conviction proceedings. *Kilmartin v. Kemna,* 253 F.3d 1087, 1088 (8th Cir. 2001); *see also Noel v. Norris,* 194 F. Supp. 2d 893, 903 (E.D. Ark. 2002).

V. DISCUSSION OF PETITIONER'S CLAIMS

After a court of appeals authorizes the filing of a successive petition based on a prima facie showing that the application satisfies the statutory standard, the petitioner must *actually show* that he satisfies the standard. *Tyler v. Cain,* 533 U.S. 656, 2481 n.3 (2001). The statutory requirement evidences Congress's intent that court of appeals review an application as a whole rather than examining each individual claim and that court's decision to permit the petition to go forward applies to the entire petition, not particularly specified claims. *Nevius v. McDaniel,* 104 F.3d 1120, 1121 (9th Cir. 1997). Therefore, the district court must address, claim by claim, the entire application authorized by the court of appeals. *Id.*

A. Claim IX: Death by Lethal Injection of a Mentally Retarded Person is Unconstitutional

The Eighth Circuit Court has remanded to this Court the questions of whether Petitioner's mental retardation claim has been exhausted and whether the facts of his case present "truly exceptional circumstances".

1. Exhaustion

Exhaustion is a prerequisite to a writ of *habeas corpus* except where such exhaustion would be futile. 28 U.S.C. § 2254(b) & (c); *Tatzel v. Hanlon,* 530 F.2d

1205 (5th Cir. 1976). If there is a viable state remedy for the non-exhausted claim, the petition should be dismissed to allow the state to decide the issue. *Carmichael v. White,* 163 F.3d 1044 (8th Cir. 1998) (finding that the district court should have dismissed petitioner's claims for failure to exhaust state remedies, as petitioner failed to show that exceptional circumstances existed to excuse the failure to exhaust). However, a petitioner is excused from exhaustion requirements when going back to the state would be futile. *Hawkins v. Higgins,* 898 F.2d 1365, 1367 (8th Cir. 1990) (finding that "[a]ny court challenge would be futile, and a waste of judicial resources"). In cases that present a "truly exceptional circumstance," a court may stay the petition and hold it in abeyance pending the outcome of state proceedings. *Lee v. Norris,* 354 F.3d 846 (8th Cir. 2004).

Respondent has essentially conceded that Petitioner, at the present time, has no non-futile state remedies in which to address his mental retardation claim.[2] (Doc. 51 at 11-12.) We find this position is

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[2] Respondent stated that "[t]he respondent would contend that Sasser's claim is exhausted because he no longer has 'the *right* under the law of the State to raise, [by a belated appeal procedure], the question presented [in *habeas*,]' but rather has only a procedure by which he can *attempt to revive* that right." (Doc. 51, pg. 11 (citing 28 U.S.C. § 2254(c)) (alterations in original.)) Respondent went on to argue that regardless of the existence of a right of law, the State courts should have the opportunity to review the issue and possibly create a remedy. (Doc. 51, pg. 12.) However, the Court notes that in *Engram v. State,*

(Continued on following page)

reasonable in light of a recent state decision. *See Engram v. State,* 200 S.W.3d 367 (Ark. 2004) (where the Arkansas Supreme Court foreclosed any avenue of reopening a case in state court involving a never before raised issue of a petitioner's mental retardation baring [sic] state execution under the new constitutional law articulated in *Atkins v. Virginia,* 536 U.S. 304 (2002), stating that Arkansas has a similar rule of law that requires a defendant to raise a mental retardation claim prior to trial and the state law adequately addresses the new constitutional law). Therefore, we find the mental retardation claim has been exhausted, as no non-futile state remedies currently exist.

The question whether "truly exceptional circumstances" exist cannot be addressed as that inquiry would be necessary only if a claim has not been exhausted in state court and the court is considering holding the petition in abeyance to allow the petitioner to exhaust his claim in state court. *See Lee v. Norris,* 354 F3d 846 (ruling on when a "truly exceptional circumstance" exists to allow a district court hold the petitioners *habeas* petition in abeyance and dismissing the unexhausted claim without prejudice to allow petitions the opportunity to raise a claim in state court instead of dismissing entire

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the Supreme Court of Arkansas addressed this issue and declined to create a state remedy for this issue. 200 S.W.3d 367 (Ark. 2004), *cert. denied,* 125 S. Ct. 2965 (2005).

petitions). In light of our finding that Petitioner is excused from exhausting his *Atkins* claim – as there are no non-futile state remedies currently available to Petitioner – the question of whether or not there are "truly exceptional circumstances" is moot.

2. Procedural Default

If a claim has been exhausted, but was not adjudicated on the merits in state court, the question of whether the claim has been procedurally defaulted must be addressed. "A federal court conducting habeas corpus review must ordinarily refrain from reviewing any issue that a state court has already found to be defaulted on an adequate and independent state-law basis." *Murray v. Hvass*, 269 F.3d 896, 900 (8th Cir. 2001) (citing *Owsley v. Bowersox*, 234 F.3d 1055, 1058 (8th Cir. 2000)). Where a petitioner has defaulted his federal claims pursuant to an independent and adequate state procedural rule, "federal habeas review of the claims is barred unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), or "where a constitutional violation has probably resulted in the conviction of one who is actually innocent," even if the petitioner failed to show cause for the default, *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Schlup v.*

Delo, 513 U.S. 298, 326-27 (1995). *See Langley v. Norris,* 465 F.3d 861, 863 (8th Cir. 2006) (citing *Bousley v. United States,* 523 U.S. 614, 622 (1998) (holding that a procedurally defaulted claim can be raised in *habeas* only if the defendant can first demonstrate cause and actual prejudice for the failure to raise it on direct review, or that he is actually innocent)). The United States Supreme Court has held that the novelty of a constitutional issue at the time of state court proceeding can give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures, permitting entertainment of the claim in subsequent federal *habeas* proceeding. *Reed v. Ross,* 468 U.S. 1 (1984).

The United States Supreme Court has also recognized an exception for those actually innocent. To meet this exception, a petitioner must show that he is actually innocent of the crime or the punishment and that a failure to review his claim would be a miscarriage of justice, and a "court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray,* 477 U.S. at 496. The Eighth Circuit Court clarified the actual innocence exception, stating "the concept of actual innocence is used as a 'gateway,' that is, actual innocence, if it can be shown, opens the gate to consideration of constitutional claims on their merits, claims that would otherwise be procedurally barred. . . ." *Flanders v. Graves,* 299 F.3d 974, 977 (8th Cir. 2002) (citing *Sawyer v. Whitley,* 505 U.S. 333

(1992); *Kuhlmann v. Wilson,* 477 U.S. 436 (1986)). To establish actual innocence, a petitioner must demonstrate that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Schlup,* 513 U.S. at 327-28 (citation omitted).

The actual innocence exception is not limited to inquiry into actual innocence of the crime, but extends to actual innocence of the punishment. In *Sawyer v. Whitley,* the United States Supreme Court examined the issue of actual innocence of the death penalty. 505 U.S. 333 (1992). The Court held that to show actual innocence of the death penalty, a petitioner has to "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336. The Eighth Circuit Court has applied a more lenient test, stating the actual innocence exception "will be available if the federal constitutional error alleged *probably* resulted in a verdict of death against whom the jury would otherwise have sentenced to life imprisonment." *Id.* at 345, (quoting *Stokes v. Armontrout,* 893 F.2d 152, 156 (8th Cir. 1989) (additional citation omitted)).

In the case *sub judice,* the mental retardation claim has been procedurally defaulted, as Petitioner did not properly and timely raise the claim in his state court appeals, nor has he successfully shown that a procedural default exception applies. The

"Cause and Prejudice" exception and the "Actual Innocence" exception, as well as a showing of fundamental miscarriage of justice may have been applicable to Petitioner's mental retardation claim, except, as discussed below, Petitioner has failed to provide sufficient evidence of mental retardation.[3] Without a sufficient showing of mental retardation, further inquiry into Petitioner's *Atkins* claim is not warranted. *See Wiggins v. Lockhart,* 825 F.2d 1237, 1238 (8th Cir. 1987), *cert. denied,* 484 U.S. 1074 (1988), *see also* 28 U.S.C. § 2254(e)(2)(B) (a Court may not hold an evidentiary hearing on a claim arising from a new rule of constitutional law unless the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error no reasonable fact finder would have imposed the death penalty).

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[3] It is unlikely that Petitioner would have qualified for the "Cause and Prejudice" exception. Petitioner argues that *Atkins* created a new constitutional right, therefore, cause exists for his failure to raise his *Atkins* claim in state court. *See Reed v. Ross,* 468 U.S. 1, 16 (1984) ("where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). However, cause does not exist if a petitioner had tools available for him to construct the necessary legal argument during earlier proceedings. *Frizzell v. Hopkins,* 87 F.3d 1019, 1021 (8th Cir. 1996), *see also* 28 U.S.C. § 2254(e)(2)(A)(i). Here, Petitioner had available to him during trial and in later proceedings Ark. Code Ann. § 5-4-618(b), which prohibits the sentence of death when the defendant is mentally retarded.

3. Evidence of Mental Retardation

Petitioner carries the burden of presenting sufficient facts to show that a writ is warranted. *Id.*

The standard to prove mental retardation is set fourth [sic] as[4]:

> Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and
>
> Deficits in adaptive behavior.
>
> There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

Ark. Code Ann. § 5-4-618 (Michie 2004).

Petitioner presented the Court with an affidavit (Doc. 58) to support his claim of mental retardation. Petitioner states that the affidavit "confirms Petitioners mental retardation." *Id.* However, it is imperative to recognize that the affiants do not state that Petitioner was mentally retarded, but opined that he *may* be mentally retarded. The affidavit was prepared

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[4] The United States Supreme Court left the definition of mental retardation to the States. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986) ("we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences")).

by two licensed clinical social workers, hired by Petitioner's attorney to "provide an opinion regarding the adequacy of previous investigations specifically as they relate to identifying mental retardation and other relevant social, emotional and mental deficits in the case of [Petitioner]." The affiants discussed Petitioner's I.Q. (79), school records, and social behaviors to support their belief that Petitioner may be mentally retarded.

The evidence presented to the Court does not rise to the level of requiring further inquiry. *See Wiggins*, 825 F.2d at 1238 ("In order to warrant relief, or, as an initial matter, even an evidentiary hearing, a habeas corpus petitioner must allege sufficient facts to establish a constitutional claim. Mere conclusory allegations will not suffice.") Petitioner has not provided the results of an I.Q. test that would trigger a presumption that he is mentally retarded (I.Q. of 65 under Ark. Code Ann. § 5-4-618), nor did he present any medical findings that Petitioner is mentally retarded. The claim that Petitioner is mentally retarded and cannot be executed without violating the constitution, in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), is not supported by sufficient facts for the Court to grant a writ of *habeas corpus* or to order an evidentiary hearing. Accordingly, we find that Petitioner's mental retardation claim is procedurally defaulted and default is not excused. The claim is hereby **DISMISSED with prejudice**.

B. Remaining Claims

The Eighth Circuit Court limited the issue on remand to "the question of whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242 (2002) the Eighth Amendment prohibits his execution." (Doc. 37.) The Eight [sic] Circuit Court amended its judgment (Doc. 37) by remanding specific questions regarding exhaustion of the mental retardation claim. (Doc. 44.) The only proper claim before the Court is whether Petitioner is mentally retarded and whether his execution is prohibited by the Eighth Amendment. However, in order to preserve judicial economy, we reviewed the remaining claims.

1. Claims X-XII[5]

Abusive claims, one that could have been brought at the time of the original *habeas* petition, are unreviewable absent showing of either cause and

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[5] Claim X, Petitioner's Death Sentence Should be Vacated Because Counsel was Ineffective for Failing to Adequately Investigate, Develop, and Present Mitigating Evidence Including Evidence of Mental Retardation.

Claim XI, Mr. Sasser's Statement was Taken in Violation of the Fifth, Sixth, and Fourteenth Amendments, Requiring that his Convictions and Death Sentence be Vacated.

Claim XII, Mr. Sasser was not Competent at the Time of Trial, Direct Appeal, and Post-Conviction Proceeding Stages and Prior Counsel Provided Ineffective Assistance on These Matters. (Doc. 48.)

prejudice or actual innocence. *Cochrell v. Purkett,* 113 F.3d 124 (8th Cir. 1997) (citing *Schlup v. Delo,* 513 U.S. 298, 318 n.34 (1995)). The facts alleged in Claims X-XII were known or should have been known to Petitioner at the time he filed his first *habeas* petition.

Because Claim X is related to the mental retardation claim remanded by the Eight [sic] Circuit Court, we will review the claim on its merits. Claim X includes a claim that Petitioner's trial defense counsel was ineffective for failing to investigate whether Petitioner was mentally retarded. *Atkins v. Virginia,* established a new constitutional rule that prohibits the execution of mentally retarded persons. 536 U.S. 302 (2002). The creation of a new constitutional rule may excuse a Petitioner from raising the newly recognized claim in a previous petition for writ of *habeas corpus,* if the issue is novel enough to warrant excusing the procedural default. *Reed v. Ross,* 468 U.S. 1 (1984); 28 U.S.C. 2244(b)(2). However, in the case *sub judice,* Petitioner had a State rule similar to the one created in *Atkins,* available to him both at trial and during his appeals. Due to the similar State rule prohibiting the execution of mentally retarded persons, whether Petitioner is mentally retarded or that his counsel failed to discover he was mentally retarded are issues that could or should have been known at the time Petitioner filed his first *habeas* petition. Furthermore, "'attorney error that results in a procedural default' is not cause unless the attorney's performance was constitutionally deficient." *Armstrong*

v. Iowa, 418 F.3d 924, 927 (8th Cir. 2005) (quoting *Murray v. Carrier,* 477 U.S. 478, 488 (1986)), *cert. denied,* 126 S. Ct. 1351 (2006). Petitioner has failed to show that he is mentally retarded, therefore, he cannot show prejudice in his attorney's failure to find and present evidence of mental retardation.[6]

The issues contained in the rest of Claim X (failure to investigate and present mitigating evidence) and Claims XI-XII (whether Petitioner was competent during proceedings and whether counsel provided ineffective assistance regarding Petitioner's alleged incompetence[7]) also could or should have been known at the time Petitioner filed his first *habeas* petition.

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[6] Even if Claims X-XII were not abusive, they would not survive a review on their merits. There has not been an adequate showing that Petitioner is mentally retarded or was not competent during trial or after trial. The ineffective assistance of counsel claims would fail under *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Under *Strickland,* Petitioner "must show that counsel's performance was deficient. . . . [and] that the deficient performance prejudiced the defense." *Id.* Objective medical and clinical data does not show that Petitioner is mentally retarded or that he was not competent during trial, thus failure to conduct further investigations into the issues was not objectively unreasonable under *Strickland,* as any possible deficiency failed to prejudice Petitioner. Since there is no finding of mental retardation, the claim that Petitioner's statement was involuntary due to mental retardation must also fail.

[7] *Id.*

Accordingly, the Court finds Claims X-XII impermissible as abusive claims and they are hereby **DISMISSED with prejudice.**

2. Claims I-VIII

Same-claim successive petitions are prohibited. 28 U.S.C.A. § 2244(b)(1) (1996) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Any claim that had been previously adjudicated and denied on the merits in a previous federal *habeas* proceeding, shall be dismissed, without a finding, unless a "substantial injustice" will occur in the absence of a finding. 28 U.S.C. 2244(b)(1); *Reyes-Requena v. United States,* 243 F.3d 893, 899 (5th Cir. 2001); *LaFevers v. Gibson,* 238 F.3d 1263, 1256-66 (10th Cir. 2001).

Petitioner attempts to relitigate claims raised in his original petition by stating he is incorporating the claims of the prior petition,[8] and by numbering the first claim in the successive petition IX (the initial petition contained claims numbered I-VIII. The claims contained in the original petition have been adjudicated on their merits and are thus impermissible

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[8] Petitioner states that "Claims 1 to 8 are in Mr. Sasser's original and/or amended petition for habeas corpus relief and are incorporated herein." Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief, p. 6 n.1 (Doc. 48).

claims in Petitioner's current successive petition. Therefore, the claims that were adjudicated as part of the original petition, Claims I-VIII, are impermissible claims and are hereby **DISMISSED with prejudice**.

VI. CONCLUSION

In light of the above findings, the Court finds that Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* should be and hereby is **DENIED** in its entirety. Judgment will be entered accordingly.

IT IS SO ORDERED this 9th day of January 2007.

/s/ Harry F. Barnes
Harry F. Barnes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER — PETITIONER

V. — Civil No. 00-4036

LARRY NORRIS, Director
of Arkansas Department
of Corrections — RESPONDENT

MEMORANDUM OPINION AND ORDER

Currently before this Court are Petitioner's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 73), Respondent's Response (Doc. 76), and Petitioner's Reply (Doc. 79). Respondent opposes the motion, contending the 28 U.S.C. § 2244 does not permit Petitioner's Rule 59(e) motion, and if the motion is permitted, Petitioner has failed to show that the judgment was clearly erroneous and would work a manifest injustice. (Doc. 76.) The Court finds that these matters are ripe for consideration. For the reasons stated in this Order, Petitioner's motion (Doc. 73) is hereby **DENIED**.

"Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *United States v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (internal quotation marks and additional citation omitted). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or

raised prior to entry of judgment." *Id.* In a habeas action, a Petitioner may not use a Rule 59(e) motion to file what in reality is a second or successive petition without proper authorization. *United States v. Lambros,* 404 F.3d 1034, 1036, 1037 (8th Cir. 2005), *cert. denied,* 516 U.S. 1135 (2005) (finding that the petitioner's Rule 59(e) motion "sought ultimately to resurrect the denial of his earlier § 2255 motion" and upheld the district court's dismissal, as the motion was properly construed as an effort to file a successive motion for postconviction relief).

I. EVIDENTIARY HEARING

Petitioner contends the Court wrongly applied 28 U.S.C. 2254(e)(2) when it decided not to order an evidentiary hearing. Petitioner argues that 2254(e)(2) was not applicable because Petitioner did not fail to develop the factual basis for his claim in State court, as required by the statute (as the basis for the claim was not available to him until after his State court proceedings had fully concluded). (Doc. 73, p. 35.)

We find that Petitioner did fail to develop the factual basis for his mental retardation claim in State Court. There was a lack of diligence on Petitioner's part in developing the facts of his mental retardation claim, as a State statute, Ark. Code. Ann § 5-4-618, that protected mentally retarded persons from execution existed at the time of Petitioner's State trial and Petitioner failed to assert the State protections. *See Williams v. Taylor,* 529 U.S. 420, (2000) (holding that

28 U.S.C. § 2254(e)(2) is applicable to situations where a petitioner lacked diligence, or some greater fault, in developing the facts of his claim in State court).

At the time of Petitioner's trial, Arkansas had a statute that provided an avenue for Petitioner to assert that he was mentally retarded. *See* Ark. Code Ann. § 5-4-618. The Arkansas statute clearly set out the requirements for a criminal defendant in a capital case to show that he is mentally retarded; thus, making him ineligible for the death penalty. Petitioner did not take advantage of the Arkansas statute. It appears that the Arkansas statute complies with providing the protections required by *Atkins v. Virginia,* 536 U.S. 304 (2002) (finding that it is unconstitutional to execute a person who is mentally retardad). Therefore, even if *Atkins* is a new rule of constitutional law, the rule of *Atkins* was not "previously unavailable" to Petitioner. *See* 28 U.S.C. § 2254(e)(2)(A)(i).

Even if we were to find that the mental retardation claim was not "previously unavailable," we would find that Petitioner failed to meet the requirements of 28 U.S.C. § 2254(e)(2)(B). Petitioner's conclusory allegations and provisional conclusions, contained in an affidavit (Doc. 58), even if proven, would not be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have given Petitioner a sentence of death. *See* 28 U.S.C. § 2254(e)(2)(B); *see also, Wiggins v. Lockhart,* 825 F.2d 1237, 1238 (8th Cir. 1987), *cert. denied,* 484 U.S. 1074 (1988) (holding that "[m]ere

conclusory allegations will not suffice" to warrant relief or even an evidentiary hearing). We found that many of the alleged facts were not proven; such as Petitioner's claim that the supporting affidavit, Doc. 58, "confirmed" Petitioner's mental retardation (Doc. 48, p. 8), when in actuality the affidavit contained several conclusory allegations and expressed the opinion that Petitioner's background *suggests* that Petitioner "may be mentally retarded" (Doc. 58, para. 12).[1]

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[1] Examples of allegations contained in the affidavit are:

The affidavit states that Petitioner's intelligence quotient (IQ) of 79, while taking into account the five-point margin of error, may place him cognitively in the range of mental retardation. To be presumed mentally retarded in Arkansas, one must have an IQ of 65 or lower. Ark. Code Ann. § 5-4-618. Even with a five-point margin of error, Petitioner does not have low enough of an IQ to be presumed mentally retarded.

The affidavit also contained several different accounts by Petitioner's family members, however, no affidavit from the family members or any other form of evidence regarding the family member's recollections were offered. An unidentified brother of Petitioner stated that Petitioner never took the written test to obtain a learner's permit to drive a car and never received a driver's license. The brother stated he didn't think Petitioner could pass the test. There were also statements that Petitioner never attempted to rent or buy a home, or paid any utilities, phone or other bills associated with independent living. Also, the affidavit discussed Petitioner's work history, which consisted largely of manual labor jobs, which was inconsistent with the sort of employment his siblings have (consistent employment at the same company for many years, one being a preacher). The affidavit described an event where Petitioner stated he was leaving home to join the Army, but was later found to have been

(Continued on following page)

More importantly, the affidavit itself states that the conclusions contained were only provisional and that "it is imperative that a complete psychosocial history and thorough evaluation by a medical doctor or professional qualified by an appropriate licensing board to evaluate developmental disabilities be conducted." (Doc. 58, para. 12.)

At least by September 3, 2004, Petitioner's counsel were aware that additional evidence was needed. *See* Doc. 48, p. 5, Second Supplemental and Amended Petition (Petitioner stated that the filing of the petition did not waive "any additional time that Mr. Sasser needs to complete the investigation and preparation of a complete social history and otherwise be in a position to determine what if any additional

---

living in an abandoned truck in a wooded area. There was no supportive evidence to support any of these statements. There was also information that Petitioner lived with his mother and his cousins, and he never attempted to obtain or manage a checking account. Again, no supporting evidence was offered regarding these statements.

The affidavit stated that Petitioner received a Certificate of Attendance instead of a high school diploma. Petitioner's childhood friend described Petitioner as the "class clown" in elementary school and pondered why, if Petitioner wasn't in the same classes as he, was Petitioner not in special education classes, since he received a Certificate of Attendance. These statements, again are not supported by any additional evidence. Furthermore, the statement by the friend alludes to special education classes being offered at Petitioner's school, yet Petitioner was not enrolled in these classes; thus, leading one to believe that Petitioner was not regarded as mentally retarded during his formative years.

testing and/or evaluation may be necessary."). Arguably, Petitioner's counsel were aware of the need for a complete psychosocial history and thorough evaluation as early as May 25, 2003, the day the affidavit (Doc. 58) was sworn to and subscribed. Petitioner has had over two years in which to complete the social history and to request access for the purpose of evaluation.

We find that the affidavit was provisional, consisting of many conclusory allegations, and further evidence was needed to warrant relief or even an evidentiary hearing. An evidentiary hearing was not ordered due to Petitioner's failure to allege sufficient facts to warrant an evidentiary hearing. We cannot find that there is reason to believe Petitioner can show by clear and convincing evidence that he is mentally retarded. Therefore, pursuant to 28 U.S.C. § 2254(e)(2)(B), we may not hold an evidentiary hearing.

Furthermore, we find that, absent § 2254(e)(2), no error was made in denying Petitioner's request for an evidentiary hearing. The Court would not have been assisted by an evidentiary hearing. *See Newton v. Kemna*, 354 F.3d 776, 785 (8th Cir. 2004) ("[T]he court may deny an evidentiary hearing if such a hearing would not assist in resolving the petitioner's claim. . . . [E]ven if the facts [the petitioner] seeks to prove are true, if those facts would not entitle him to relief . . . then the District Court did not abuse its discretion in denying [the petitioner's] request for an evidentiary hearing.") If Petitioner's alleged facts

were proved, they did not amount to a showing that Petitioner is entitled to habeas relief. We are not persuaded by Petitioner's argument that we should have granted an evidentiary hearing; nor are we convinced that any error occurred regarding the decision not to order an evidentiary hearing.

II. REMAINING CLAIMS[2]

Petitioner also claims that his mental retardation claim is not subject to dismissal on grounds of procedural default and if it was defaulted, he can show cause and prejudice excusing the default or that the miscarriage of justice exception applies. Additionally, Petitioner claims that his trial counsel's failure to investigate and present evidence of his mental retardation at trial was constitutionally ineffective assistance of counsel and Petitioner's failure to previously present Claims X (ineffective assistance of counsel in failing to investigate and present evidence of mental retardation), XI (competency to stand trial), and XII (ability to knowingly and intelligently waive the right

---

[2] Because Petitioner has failed to present arguments necessitating we revisit his claims, we do not reach the question of whether this part of the motion is a successive petition under *United States v. Lambros*, or is a proper Rule 59(e) motion under a rule analogous to that which was presented in *Gonzales v. Crosby*, 545 U.S. 524 (2005) (explaining that a Rule 60(b) motion attacking a previous ruling which precluded a determination on the merits was a proper motion, unlike an attack on a ruling made on the merits – which would be construed as a successive petition).

to remain silent) should be excused as he can show cause and prejudice for the omissions. (Doc. 73.)

Petitioner raises various arguments in support of the above claims, specifically arguing that the claims were not procedurally defaulted, and if they had been, they meet the requirements of excuse or the miscarriage of justice exception applies. The arguments presented are reiterations of arguments Petitioner previously made in support of his habeas petition. Relief is not warranted as we have fully considered and rejected these arguments during our resolution of Petitioner's successive habeas petition (Doc. 48). *See Williams v. Norris,* 461 F.3d 999, 1004 (8th Cir. 2006) ("A *Rule 59(e)* motion cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment.") (additional citation omitted); *Mincey v. Head,* 206 F.3d 1106, 1137 n. 69 (11th Cir. 2000) (explaining that "the function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters"). Moreover, Petitioner has failed to present anything that necessitates we revisit these claims, such as showing manifest errors of law or fact, or providing newly discovered evidence.

III. CONCLUSION

In light of the above findings, the Court finds that Petitioner's Rule 59(e) motion (Doc. 73) should be and hereby is **DENIED**.

IT IS SO ORDERED this 18th day of April 2007.

/S/ Harry F. Barnes
Harry F. Barnes
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3103

Andrew Sasser, Appellant, v. Larry Norris, Director, Arkansas Department of Corrections, Appellee.	* * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas.

AMENDED JUDGMENT

Before MORRIS SHEPPARD ARNOLD, MURPHY, and MELLOY, Circuit Judges.

Upon consideration of appellant's [sic] petition for rehearing, the panel issues this amended judgment.

Previously, this panel remanded appellant's mental retardation claim to the district court to determine whether appellant was mentally retarded and whether, pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibits his execution. *Sasser v. Norris*, No. 02-3103 (8th Cir. August 15, 2003) (order). Subsequently, appellee petitioned for rehearing and clarification, arguing that the mental retardation claim is not exhausted. Because it is unclear whether appellant has any currently available non-futile state remedies, we revise the previously entered order and remand the case to the district court for a determination of the

exhaustion issue. *See Rhines v. Weber*, 345 F.3d 799, 800 (8th Cir. 2003) (per curiam) (decisions about exhaustion and procedural default are better addressed by district court in the first instance), *petition for cert. filed*, (U.S. Feb. 19, 2004) (No. 03-9046).

In the event the district court concludes appellant has a viable state court remedy, we invite the district court to consider whether appellant's mental retardation claim, which is based on the newly recognized federal constitutional right articulated in *Atkins*, presents "truly exceptional circumstances" involving "a consideration going beyond the running of the statute of limitations," as those terms are defined in *Lee v. Norris*, 354 F.3d 846, 850 (8th Cir. 2004). If it so concludes, the district court may wish to hold the remanded petition in abeyance pending the outcome of state court proceedings on the mental retardation claim.

Appellee also seeks clarification as to whether the panel's prior order was entered by a single judge. We refer appellee to Federal Rule of Appellate Procedure 27(c) and Eighth Circuit Rule 27(b) and deny the motion for clarification.

March 9, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3103

Andrew Sasser, Appellant, v. Larry Norris, Director, Arkansas Department of Corrections, Appellee.	* * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas

JUDGMENT

The motion to remand is granted. The issue on remand is limited to the question of whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution. To the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted.

(5361-010199)

August 15, 2003

Order Entered at the Direction of the Court

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2385

Andrew Sasser,

Appellant

v.

Larry Norris, Director,
Arkansas Department of Corrections,

Appellee

Appeal from U.S. District Court for the
Western District of Arkansas – Texarkana
(4:00-cv-4036-HFB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Wollman, Judge Colloton and Judge Gruender would grant the petition for rehearing en banc.

Judge Smith and Judge Shepherd did not participate in the consideration or decision of this matter.

COLLOTON, Circuit Judge, dissenting from denial of rehearing en banc.

For the reasons discussed in *Simpson v. Norris*, 499 F.3d 874 (8th Cir. 2007) (opinion dissenting from

denial of rehearing en banc), I would grant rehearing to reconsider the panel's conclusion that Andrew Sasser did not procedurally default his Eighth Amendment claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), by failing to raise the defense of mental retardation in accordance with the Arkansas Code during state court proceedings. *See Sasser v. Norris*, 553 F.3d 1121, 1125 (8th Cir. 2009). Arkansas already complied with the Eighth Amendment rule of *Atkins* before *Atkins* was decided, *see* 536 U.S. at 314 & n.12; Ark. Code Ann. § 5-4-618, yet Sasser made no effort to invoke the protections that Arkansas law provided. The district court thus concluded that Sasser had procedurally defaulted his *Atkins* claim. *Sasser v. Norris*, No. 00-4036, 2007 WL 63765, at *6-7 & n.3 (W.D. Ark. Jan. 9, 2007).

The *Sasser* panel concluded that the district court's reasoning was "invalid" in light of *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007). *Sasser*, 553 F.3d at 1125. That is one plausible reading of *Simpson*, although the potentially applicable discussion is cryptic. *See* 490 F.3d at 1035. Simpson himself, on the other hand, argued in opposition to the State's petition for writ of certiorari that the issue of procedural default was not decided by this court, and that *Simpson* addressed only the applicability of 28 U.S.C. § 2254(e)(2) and the statutory requirements for an evidentiary hearing. Brief in Opposition to Petition for Writ of Certiorari at 4, *Norris v. Simpson*, No. 07-653 (U.S. Jan. 16, 2008). Indeed, in response to the State's contention that this court's decision on

procedural default conflicted with *Dugger v. Adams*, 489 U.S. 401, 407-10 (1989), Simpson urged that "the Eighth Circuit is still free to adopt [the State's] position if it is timely presented to that court in a later case." Brief in Opposition at 6.

In this case, the issue is squarely presented. The district court ruled that Sasser's *Atkins* claim was procedurally defaulted, and the three-judge panel of this court addressed the point directly. I would therefore grant rehearing to reconsider the panel's conclusion on procedural default.[1]

April 14, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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[1] The State also urges rehearing on the question whether Sasser's petition for writ of habeas corpus is an impermissible successive petition under 28 U.S.C. § 2244(b)(2)(A). The State's argument on that point, however, does not seem to recognize the possibility that if a prisoner *had raised* a meritorious mental retardation claim in accordance with the Arkansas procedure, but the Arkansas courts nonetheless rejected it, then relief would not have been available from federal courts applying the Eighth Amendment to a first federal habeas petition that was resolved before *Atkins*.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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28 U.S.C. § 2254. State custody; remedies in Federal courts

* * *

(e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

* * *

---

(3)

No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

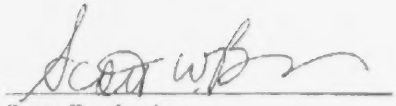
MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Andrew Sasser, through the undersigned counsel, asks leave to proceed in forma pauperis.

Mr. Sasser was declared indigent prior to his trial in 1993. He has remained indigent and represented by court appointed counsel since that time. Mr. Sasser was granted leave to proceed in forma pauperis in 1999 before the United States District Court, Eastern District of Arkansas. The Federal Public Defender was appointed and has continued to represent Mr. Sasser since that time.

Because of Mr. Sasser's poverty, he is unable to pay the costs of these proceedings or give security therefor.

Executed on September 11, 2009.



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No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

Brief in Opposition
to Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

CAPITAL CASE

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STATEMENT OF THE CASE

The Petition for Certiorari contains serious misstatements of both fact and law which directly bear on what issues properly would be before this Court if Certiorari were granted. As such, and in order to comply clearly and fully with Supreme Court Rule 15(2), Respondent Andrew Sasser includes a statement of the case in this Brief in Opposition. Sup. Ct. R. 15(2); *see also Carcieri v. Salazar*, ___ U.S. __ (2009) (failure to dispute factual assertion was reason to accept fact as true for Court's decision); *Baldwin v. Reese*, 541 U.S. 27 (2004) (a non jurisdictional argument not raised in respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived). As discussed below, contrary to Petitioner Norris's claims, the Petition presents no significant questions regarding the application of AEDPA; Petitioner Norris has reworked the Eighth Circuit's opinion in *Sasser v. Norris*, 553 F.3d 1121 (8th Cir. 2009), to seek review of the Eighth Circuit's proper response to Arkansas's failure to fully implement this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Eighth Circuit's opinion is not in conflict with the decisions of this Court or those of any other circuit courts. It is simply a ruling that, on the facts of this case, an evidentiary hearing must be conducted on the merits of Mr. Sasser's *Atkins* claim, and that any argument that the State might have had regarding the timeliness of Mr. Sasser's second petition was forfeited by the its failure to properly raise it in the district court.

A. The Court of Appeals' Authorization Decision

On June 20, 2002, after Mr. Sasser's first habeas petition had already been dismissed with prejudice by the district court, this Court handed down its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). On June 18, 2003, while his appeal of the district court's denial of relief was pending, Mr. Sasser filed a Motion for Remand or, in the Alternative, a Motion to File a Second or Successive Habeas Corpus Petition in the Eighth Circuit Court of Appeals. Mr. Sasser attached to his motion a Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254, which contained extensive information and exhibits regarding the evidence underlying his *Atkins* claim. Mr. Norris responded to Mr. Sasser's motion, arguing that this Court's decision in *Atkins* did not create a new rule of constitutional law; that despite this Court's prior decision in *Penry v. Lynaugh*, 492 U.S 302 (1989), Mr. Sasser was required to have raised his federal constitutional claim prior to *Atkins*; and that *Atkins* was not retroactive. At no point did Mr. Norris argue the untimeliness of Mr. Sasser's petition.

On August 21, 2003, the Eighth Circuit granted Mr. Sasser's motion to remand, "and to the extent the request for remand [was] the functional equivalent to an application to file a successive habeas petition," granted Mr. Sasser's motion to file a successive petition. *Sasser v. Norris*, No. 02-3101, Doc. 37, Judgment, at 1 (8th Cir. Aug. 21, 2003). The court directed the district court to decide two questions: (1) whether Mr. Sasser is mentally retarded; and (2) whether pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibits his

execution.

Shortly after remand, on August 29, 2003, the district court entered a scheduling order directing Mr. Sasser to file an amended petition and a motion for an evidentiary hearing, and also adding an additional question to the Eighth Circuit's remand order – whether Mr. Sasser had "waived" his *Atkins* claim by not raising a claim in the state courts under a pre-*Atkins* state mental retardation statute. *Sasser v. Norris*, No. 00-4036, Doc. 40, Scheduling Order, at 1 (W.D. Ark. Aug. 29, 2003).

Also on August 29, 2003, Mr. Norris filed a Petition for Rehearing in the Eighth Circuit, arguing *inter alia* that Mr. Sasser had yet to exhaust his *Atkins* claim in the state courts. *Sasser v. Norris*, No. 02-3103, Petition for Rehearing with Petition for Rehearing En Banc (8th Cir. Aug. 29, 2003). Mr. Norris argued that Mr. Sasser's Atkins claim was unexhausted, and that it was procedurally defaulted because of his failure to exhaust. *Id.* Again, Mr. Norris made no argument regarding the timeliness of Mr. Sasser's petition.[1]

On April 22, 2004, the Eighth Circuit issued an amended judgment, directing the district court to first determine whether Mr. Sasser's *Atkins* claim had been

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[1]Mr. Norris misstated the record in his petition for rehearing when he represented that Mr. Sasser's federal constitutional mental retardation claim "plainly was available when his first habeas petition was pending at the time that *Atkins* was decided." *Sasser v. Norris*, No. 02-3103, Appellee's Petition for Rehearing at 4-5 (8th Cir. Aug. 28, 2003). This is incorrect. Mr. Sasser's habeas petition was dismissed on May 23, 2003, approximately one month before *Atkins* was decided.

Mr. Norris's decision to file a petition for rehearing and rehearing en banc, a pleading expressly disallowed by 28 U.S.C. § 2244(b)(3)(E), delayed the proceedings in Mr. Sasser's case for approximately eight months.

exhausted and, in the event that a viable state court remedy was identified, to consider holding the remanded Petition in abeyance pending resolution of Mr. Sasser's claim by the state courts. *Sasser v. Norris*, No. 02-3163, Doc. 44, Amended Judgment, at 1 (8th Cir. Apr. 22, 2004).

B. District Court Proceedings Following Authorization

Pursuant to the district court's direction, Mr. Sasser filed an amended petition setting forth his Eighth Amendment mental retardation claim on September 3, 2004. *Sasser v. Norris*, No. 00-4036, Doc. 48, Second Supplemental and Amended Petition (W.D. Ark. Sept. 3, 2004). Again, Mr. Sasser put forward extensive information regarding the evidence underlying his *Atkins* claim. Mr. Sasser specifically requested an evidentiary hearing on the issue of his mental retardation. *Id.* at 31. Mr. Norris filed his Response on November 5, 2004, *Sasser v. Norris*, No. 00-4036, Doc. 51, Response (W.D. Ark. Nov. 5, 2004), and again, Mr. Norris asserted no issues regarding the timeliness of Mr. Sasser's successive petition.

The denial of certiorari in another Arkansas death penalty case, *Engram v. Arkansas*, 545 U.S. 1159 (Aug. 22, 2005), finally made clear that no viable state court remedy existed for Eighth Amendment claims such as Mr. Sasser's, and the parties accordingly began the discovery process before the district court. In his opposition to Mr. Sasser's discovery requests, Mr. Norris for the first time mentioned the timeliness of Mr. Sasser's Petition, incoherently stating that Mr. Sasser "did not present his claim of mental retardation in state court and because

he did not present it in this Court within a year after *Atkins* had been decided and before his initial petition had been dismissed with prejudice, his current petition is barred and there is, therefore, no basis for the leave to conduct discovery." *Sasser v. Norris*, No. 00-4036, Doc. 61, Motion to Preclude Discovery at 6 (W.D. Ark. Jan. 13, 2006).[4] Mr. Norris further argued that Mr. Sasser was not entitled to a hearing because under 28 U.S.C. §§ 2254(b)(2) and (e)(2) he had not presented his mental retardation claim in state court. *Id.* at 4.

On June 14, 2006, the district court issued a scheduling order regarding the completion of discovery and informing Mr. Sasser that any additional motions regarding his mental retardation claim must be filed by August 31, 2006. *Sasser v. Norris*, No. 00-4036, Doc. 65, Scheduling Order (W.D. Ark. June 14, 2006). As noted, Mr. Sasser had previously moved for an evidentiary hearing before the district court, and this request was still pending at the time of the district court's scheduling order. *Sasser v. Norris*, No. 00-4036, Doc. 48, Second Supplemental and Amended Petition (W.D. Ark. Sept. 8, 2004). Believing that he had already amply established his entitlement to a hearing, Mr. Sasser filed no additional motions.

On January 9, 2007, the district court entered an order denying Mr. Sasser's petition without conducting an evidentiary hearing. Pet'r App. at 17-37. The district court first addressed the exhaustion issue, finding that, as Mr. Sasser had no non-futile state remedies available, his *Atkins* claim was exhausted. The court

[4]This particular reference to the statute of limitations, buried in a seven page opposition to Mr. Sasser's discovery motion, went unnoticed by both parties until two days before oral argument in the Eighth Circuit, when Mr. Norris apparently discovered the reference and included it in a response to a 28(j) letter submitted by Mr. Sasser. It appears nowhere in either party's briefing.

then went on to find that the claim was procedurally defaulted because it had not been presented to the state courts during his state post-conviction proceedings.[3] The district court further found that Mr. Sasser had not shown that an exception to the procedural default doctrine applied to his case, and denied relief.

Mr. Sasser filed a Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) on January 23, 2007. *Sasser v. Norris*, No. 00-4036, Doc. 73, Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P 59(e) (W.D. Ark. Jan. 23, 2007). That Motion was denied by the district court on April 18, 2007. *Sasser v. Norris*, No. 00-4036, Doc. 80, Order Denying Motion to Alter Judgment (W.D. Ark. Apr. 18, 2007). Mr. Sasser timely filed his Notice of Appeal on May 17, 2007. On June 11, 2007, the district court granted a certificate of appealability pursuant to 28 U.S.C. § 2253 on two grounds, "Ground 1: Whether this Court was correct in its ruling that Mr. Sasser was not entitled to relief on his claim that his death sentence violates the Eighth and Fourteenth Amendments because he is a person with mental retardation; [and] Ground 2: Whether this Court was correct in its ruling that Mr. Sasser is not entitled to relief on his claim that his death sentence should be vacated because counsel was ineffective for failing to adequately investigate, develop and present mitigating evidence including evidence of mental retardation." *Sasser v. Norris*, No. 00-4036, Doc. 84, Order (W.D. Ark. June 11, 2007).

[3] Mr. Sasser's state post-conviction proceedings concluded in 1999. *See Sasser v. State*, 993 S.W.2d 901 (1999).

C. The Court of Appeals' Decision

On appeal, Mr. Sasser argued to the Eighth Circuit that its prior decision in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied* 128 S.Ct. 1226 (2008), was controlling on the question of whether his *Atkins* claim was procedurally defaulted and mandated reversal. Mr. Sasser further argued that the district court had incorrectly denied his request for an evidentiary hearing, noting that in its prior remand order the Eighth Circuit had specifically directed the district court to conduct an evidentiary hearing and summarizing the detailed factual allegations Mr. Sasser had made in support of his *Atkins* claim. *Sasser v. Norris*, No. 07-2385, Appellant's Brief and Addendum (8th Cir. Dec. 6, 2007).

Mr. Norris's responsive brief focused on attempting to distinguish the factual and procedural circumstances underlying Mr. Sasser's case from those that had been presented to the Eighth Circuit in *Simpson*.[4] Mr. Norris also argued that Mr. Sasser had not met the requirements for filing a successive petition under 28 U.S.C. § 2244(b), in that his petition was untimely under § 2244(d) and his claim did not rely on a new rule of constitutional law under § 2244(b)(2). Mr. Norris argued that

[4]In his Statement of Facts before the Eighth Circuit, Mr. Norris misleadingly and incorrectly quoted a prior pleading filed by Mr. Sasser. Mr. Norris stated that Mr. Sasser "indicated that, although at that point his claim "may [have] be[en] only a theory and not supported by any solid evidence," he nevertheless was entitled to discovery . . . ." *Sasser v. Norris*, No. 07-2385, Brief for Appellee at 3, 39 (8th Cir. Feb. 21, 2008). Mr. Norris gratuitously altered the context of Mr. Sasser's pleading, which actually was not referring to his own claim, but rather quoting this Court's opinion in *Bracy v. Gramley*, 520 U.S. 899 (1997), in a discussion of the good cause prerequisite to the availability of discovery. *Sasser v. Norris*, No. 00-4036, Doc. 60 Motion for Leave to Conduct Discovery at 5 (W.D. Ark. Jan. 13, 2006).

the district court was correct in disposing of Mr. Sasser's claim on procedural default grounds and averred that the district court had given Mr. Sasser ample opportunities to present additional evidence regarding his claim through motions and pre-hearing discovery. At no point in his brief, did Mr. Norris mention or cite, much less argue, the question of the applicability of 28 U.S.C. § 2254(e)(2).

The Eighth Circuit reversed the decision of the district court and remanded for adjudication of the merits of Mr. Sasser's *Atkins* claim. Pet'r App. at 15-16. The court first recognized that it was bound by its prior decision in *Simpson* to find that Mr. Sasser had not procedurally defaulted his *Atkins* claim by failing to present it in state court at a time when the claim did not exist. The Eighth Circuit further held that, although an evidentiary hearing would not necessarily be required in every case, Mr. Sasser had made a specific factual showing that he is mentally retarded under *Atkins* sufficient to require that an evidentiary hearing be conducted on his claim. The Eighth Circuit noted in its opinion:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy's murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. While *Simpson* may not mandate an evidentiary hearing in every conceivable set of

> circumstances, there is no question the allegations in Sasser's petition are as adequate as Simpson's pleading threshold where the petitioner "alleged that he is mentally retarded as Atkins defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim.

Pet'r App. at 9-10. Nowhere in its opinion does the court cite to § 2254(e)(2) or discuss its application in Mr. Sasser's case.

The Eighth Circuit also addressed the issue of Mr. Norris's failure to properly raise before the district court his defense that Mr. Sasser's petition was barred by the statute of limitations. Applying its controlling decision in *Barnett v. Roper*, 541 F.3d 804 (8th Cir.), *reh'g en banc denied*, No. 07-1234 (8th Cir. 2008), the court found that Mr. Norris had forfeited his argument by arguing it for the first time on appeal. In *Barnett*, the court had held that, pursuant to the Federal Rules of Civil Procedure, an AEDPA limitations defense is forfeited unless pleaded in an answer or an amendment to the answer. *Id.* at 807. Although noting that an exception to this rule has been established by this Court that allows a district court to *sua sponte* consider the defense, *id.* (citing *Day v. McDonough*, 547 U.S. 198, 209 (2006)), the Court declined to expand that exception to permit an appellate court to disregard the State's forfeiture. *Id.*[5]

[5]Mr. Norris sought rehearing en banc from the Eighth Circuit and it was denied. Judge Colloton dissented from the denial, although on different grounds than those raised by Mr. Norris in his Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. The First Question Presented

A. The First Question Presented By Petitioner Norris Was Not Raised or Passed On By The Lower Courts.

Certiorari should be denied because the first Question Presented by the Petition was not raised in or decided by the Eighth Circuit Court of Appeals in this case. No citation to, much less discussion of, 28 U.S.C. § 2254(e)(2) appears in the opinion of either court,[6] and it is not mentioned by Mr. Norris anywhere in his appellate brief. Mr. Norris's representation to this Court that "[t]he circuit's decision presents issues that deserve further review concerning: (1) how 28 U.S.C. § 2254(e)(2) applies to a claim that is based on a previously unavailable rule of constitutional law," Pet. at 3, and his criticism of the court's allegedly "flawed construction of § 2254(e)(2)'s opening clause," Pet. at 15, are thus seriously misleading. *See Meyer v. Holley*, 537 U.S. 280 (2003) (refusing to consider issues not directly decided by the court of appeals).

The district court below ruled that Mr. Sasser "did not properly and timely raise [his mental retardation] claim in his state court appeals, nor has he successfully shown that a procedural default exception applies." Pet'r App. at 29. The court held that Mr. Sasser did not satisfy the "cause and prejudice" exception to the procedural default doctrine because he had "failed to provide sufficient evidence

[6]Reference to § 2254(e)(2) appears in the district court order denying Mr. Sasser's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e), but this was in response to the arguments of Mr. Sasser, not those of Mr. Norris.

of mental retardation." *Id.* at 30. Accordingly the district court never reached the question of whether § 2254(e)(2) had any application to this case.

On appeal, Mr. Norris defended the district court's decision on its terms, arguing that the district court "had reached the correct result." *See Sasser v. Norris*, No. 07-2385, Brief for Appellee at 8 (8th Cir. Feb. 27, 2008). Mr. Norris never asked the court of appeals to determine if Mr. Sasser's request for an evidentiary hearing on his *Atkins* claim satisfied the requirements of 28 U.S.C. § 2254(e)(2), or otherwise mentioned that statutory provision.

The Eighth Circuit reversed, finding, as required by its holding in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *cert. denied, Norris v. Simpson*, __ U.S. __, 128 S.Ct 1226 (2008), that Mr. Sasser's mental retardation claim had not been procedurally defaulted. The court also reviewed the evidence that Mr. Sasser had presented to the district court in support of his *Atkins* claim and found it amply sufficient to entitle him to an evidentiary hearing. Contrary to the misleading assertions of Petitioner Norris, the Eighth Circuit, too, never addressed the application of 28 U.S.C. § 2254(e)(2) to Mr. Sasser's mental retardation claim.

Mr. Norris asserts that

> the Eighth Circuit rejected the district court's application of 28 U.S.C. § 2254(e)(2) to Sasser's *Atkins* claim, reasoning, as it did in *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied*, 128 S.Ct 1226 (2008), that, because the new constitutional rule announced in Atkins was not available during State court proceedings, Sasser "can hardly be said to have lacked diligence in developing the factual basis of that claim in state court.

Pet. at 10-11. In fact, in its opinion the Eighth Circuit never addresses whether Mr.

Sasser exercised diligence in his state court proceedings. Rather, the quoted language appears at the end of a block quote from *Simpson*, which the court cited in Mr. Sasser's case for the proposition that an *Atkins* claim is not defaulted by an omission that occurred before *Atkins* was decided. Pet'r App. at 7-8.

Petitioner Norris essentially is attempting to use Mr. Sasser's case as a vehicle to seek review the decision of the Eighth Circuit in *Simpson*, a case in which this Court has previously denied Mr. Norris's petition for certiorari. *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *cert. denied, Norris v. Simpson*, __ U.S. __, 128 S.Ct 1226 (2008).

As the Eighth Circuit never reached the issue of whether to apply § 2254(e)(2) in Mr. Sasser's case, it cannot be said to be in conflict with the decision of this Court in *Williams v. Taylor*, 529 U.S. 420 (2000). In *Williams*, the Court examined the application of 28 U.S.C. § 2254(e)(2) to cases in which the claim at issue was raised in state court proceedings, but its factual basis was for some reason not developed. *Williams* did not address the distinct question of how 28 U.S.C. § 2254(e)(2) applies in a "new rule" situation, as this question was not before the Court. Even had the Eighth Circuit ruled as Mr. Norris claims, its decision therefore would not be in conflict with *Williams*.[7]

[7]Nor would it have created any circuit split, as the only other circuit to address this issue is in harmony with the decision of the Eighth Circuit in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007). The Fourth Circuit, in *Walker v. True*, 399 F.3d 315 (4th Cir. 2005), addressed the issue of whether 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing on a mental retardation claim for a prisoner whose state challenges were exhausted by the time *Atkins* was decided. Mr. Walker raised a claim under *Atkins v. Virginia* in a successive petition after his initial habeas petition had been denied by the district court. When the Fourth Circuit originally remanded Mr. Walker's *Atkins* claim to the district court, it left open the possibility that the district court could dismiss the claim to allow Virginia the first opportunity to assess whether Mr. Walker was mentally retarded. However, after the Fourth Circuit authorized Mr. Walker's successive petition, Virginia enacted a statute prohibiting *Atkins* claims from being brought in state court in

It is well established that this Court does not grant certiorari to consider issues that were not decided below. *See, e.g., Smith v. Butler*, 366 U.S. 161 (1961) (dismissing certiorari as improvidently granted because "the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted"). Mr. Norris's Petition should be denied because the court of appeals never passed on the issue he now asks this Court to decide.

B. The Eighth Circuit Was Correct in Remanding Mr. Sasser's *Atkins* Claim for an Evidentiary Hearing.

The Eighth Circuit reached the correct result by remanding Mr. Sasser's *Atkins* claim for an evidentiary hearing. The court found that, in his application for permission to file a successive petition and in his second amended petition for habeas corpus, Mr. Sasser made numerous detailed factual allegations that, if proven, establish he is a person with mental retardation. The Eighth Circuit noted in its opinion:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy' s murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's

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a successive habeas petition. *Walker*, 399 F.3d at 318-319. Finding that Mr. Walker's claim "ultimately derives from his rights under the Eighth Amendment," *id.* at 319, the Fourth Circuit held that § 2254(e)(2) did not apply because *Atkins* was decided after the Mr. Walker's conviction became final: "Walker's entitlement to an evidentiary hearing is not addressed by the federal habeas statutes. Section 2254(e)(2) does not apply because Walker has not "failed to develop the factual basis of [his] claim in State court." *See Walker*, 399 F.3d at 318-319 (quoting *Williams v. Taylor*, 529 U.S. 420,432 (2000)).

> house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning.

Pet'r App. at 9-10. The Eighth Circuit found that, if proven, these allegations entitle Mr. Sasser to relief from his sentence. As the State of Arkansas will not afford Mr. Sasser an evidentiary hearing in which to develop these facts, the Eighth Circuit correctly held that Mr. Sasser was denied a full and fair hearing on his highly meritorious claim in state court, and the district court erred in denying Mr. Sasser a hearing. The decision of the Eight Circuit to remand Mr. Sasser's case for an evidentiary hearing was correct and not contrary to any prior decision of this Court. Therefore, certiorari must be denied.

II. Petitioner Norris's Second Question Presents No Actual Conflict and Merely Seeks To Change a Ruling He Dislikes.

With regard to the second question presented to this Court, the Eighth Circuit's opinion poses no actual conflict with any precedent from this Court, the opinions of any circuit court, or the Rules Governing Habeas Corpus Cases, and Mr. Norris merely seeks certiorari to alter a particular judgment with which he disagrees. Mr. Norris's argument for granting the writ also misstates both the record of the case and the holding of the Eighth Circuit below.

Mr. Norris mischaracterizes the Eighth Circuit's holding as "that the district court must hold an evidentiary hearing on Sasser's *Atkins* claim based solely on the facts alleged in the petition." Pet. at 15. That is not at all what the Eighth Circuit held. Rather than confining the district court reviewing the allegations in the

petition, the court simply recognized that, in this case, those allegations were sufficient to require a hearing:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy' s murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. **While *Simpson* may not mandate an evidentiary hearing in every conceivable set of circumstances, there is no question the allegations in Sasser's petition are as adequate as Simpson's pleading threshold where the petitioner "alleged that he is mentally retarded as *Atkins* defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim.**

Pet'r App. at 9-10 (emphasis added). Accordingly, the court's reference to the language in *Simpson* – that a petitioner "is entitled to a hearing simply by virtue of 'alleging that he is mental retarded as *Atkins* defined that condition,'" Pet'r App. at 11-12 (*quoting Simpson*, 490 F.3d at 1035) – is dicta. The district court had before it detailed factual allegations, plus an expert affidavit setting forth serious and well-grounded suspicions that Mr. Sasser is a person with mental retardation and the detailing the evidence that supports that conclusion. This was amply sufficient to trigger Mr. Sasser's entitlement to an evidentiary hearing, as the Eighth Circuit correctly found. *See* Pet'r App. at 12 ("Given the circumstances and factual

allegations in Sasser's case, *Simpson* expressly requires an *Atkins* evidentiary hearing").

It is obvious then, that there is no conflict with this Court's holding in *Blackledge v. Allison*, 431 U.S. 63 (1977),[5] that not every set of allegations will mandate an evidentiary hearing, to which the Eighth Circuit's language is virtually identical.

Petitioner Norris further mischaracterizes the Eighth Circuit's holding, and the record in this case when he attacks the court's alleged "blatant disregard of a district court's authority to expand the record." Pet. at 17. Firstly, the district court never ordered Mr. Sasser to expand the record. Rather, it simply set forth a briefing schedule, directing Mr. Sasser to provide the court with any additional information, be it evidence or pleadings, that Mr. Sasser wanted the court to consider at that juncture. *Sasser v. Norris*, No. 00-4036, Doc. 65, Scheduling Order at 2 (W.D. Ark. June 14, 2006):

> Motions regarding any additional information Petitioner would like the Court to consider in relation to his mental retardation claim (such as motions for leave to file a supplemental and/or amended Petition, supplement the record, and for an evidentiary hearing) must be filed by August 31, 2006.

Id. Having set forth the factual basis for his claim in detail in his Petition, submitted the preliminary Affidavit of an expert outlining the evidence supporting

[5] In *Allison*, this Court agreed with the Fourth Circuit's remand of the petitioner's habeas petition for an evidentiary hearing. At issue in *Allison* was the sufficiency of the petitioner's plea in state court, and whether the state court record established the adequacy of Mr. Allison's plea. In Mr. Sasser's case, unlike that in *Allison*, there is no state court record, as the State of Arkansas has refused to provide any avenue for addressing mental retardation claims raised post-*Atkins*.

his claim, and moved for an evidentiary hearing, Mr. Sasser had already established his entitlement to a hearing and thus submitted no additional information. The Eighth Circuit so found, Pet'r App. at 11, and limited its decision accordingly; in no sense can it be said to have held that the district court had no authority to order expansion of the record, rather it was addressing the fact that Mr. Sasser's had fulfilled his obligations necessary to receive a hearing.

Thus, this question represents a mine-run application of law, rather than a broad decision of general principle worthy of this Court's attention.

III. The Third Question Presented

The Third Question Presented is stated as whether a district court has a mandatory duty to consider the timeliness of a successive petition under 28 U.S.C. § 2244(d)(1) before a petition can be adjudicated on the merits. Pet. at i. The argument presented by Mr. Norris in his Petition for Certiorari as the reason to grant the writ with respect to this question, however, actually raises two distinct issues. First, what are the consequences of the failure of a party to raise a statute of limitations defense in the district court. Second, if the statute of limitations defense is not raised or addressed below, does an appellate court have discretion to raise the issue *sua sponte* on appeal.

A. The Eighth Circuit's Holding that a Statute of Limitations Defense May Be Forfeited by the State's Failure to Raise It In Its Responsive Pleading in the District Court Creates No Conflict With the AEDPA.

While it is the case that, under 28 U.S.C. § 2244(b), one of the issues that a district court is charged with considering is the timeliness of an authorized second

petition, this truism does not answer the real question: what are the consequences of a party's failure to raise a statute of limitations defense in the district court. Mr. Norris's argument conflates two separate issues – namely which party has the burden of proof on a particular question and what happens when the opposing party fails to raise the argument that the party has failed to meet that burden.

The issue is analogous to sufficiency of the evidence claims. Unquestionably in a criminal trial, the state has the mandatory duty of proving each element of an offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970). However, if the state fails to meet its burden with respect to an element, the consequences depend on whether the defendant has objected and raised that failure as an issue. If he has not, it is forfeited.

It is commonplace that defendants must make an appropriate motion in the trial court to preserve an argument for appeal even where the plaintiff or prosecution has the burden of proof on the issue. *See, e.g., United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (failure to move for a judgment of acquittal at the close of evidence forfeits a claim that the evidence was insufficient). *Cf. Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 291-92 (2d Cir. 2003) (Sotomayor, J., concurring) (defendants waived argument that plaintiff's attorney's fees were not compensable damages that could support punitive damages by "neglecting to make this argument in the district court:" a party is barred from challenging the sufficiency of evidence on an issue unless it has timely moved in the district court for judgment as a matter of law on that issue); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir.

1992) (defendant forfeited argument that government failed to meet Fed. R. Evid. 404(b)'s preliminary showing requirement; "the burden was on [the defendant] to move to strike the evidence when the government failed to satisfy its burden of proof").

The same result pertains here; therefore, there is no basis to treat the statute of limitations in a second or successive petition context any differently than as in *Day v. McDonough*, 547 U.S. 198 (2006), where the factual setting involved a first petition. In *Day*, this Court held that, in limited circumstances, district courts may, in their discretion, consider the issue of limitations *sua sponte*, despite the State's forfeiture.[9] *See Day v. McDonough*, 547 U.S. 198 (2006). *Day* involved an initial habeas petition in which the State miscalculated the filing date for the petition, concluding that it was timely when in fact it was not. The magistrate judge in the case noticed the miscalculation, and recommended that the petition be dismissed. The Court noted that the magistrate judge, at that stage of the case, also could have taken the path of asking the State to amend its answer. Ultimately, this Court found that statute of limitation defenses are not jurisdictional, and that while district courts may consider the statute of limitations *sua sponte*, they are also under no obligation to do so. *Id.* at 205.[10]

[9]In footnote 3 of this Court's decision, the Court disagreed with Petitioner Day's reading of the Eleventh Circuit's opinion as placing a mandatory duty on district courts to address the statute of limitations. *Day*, 547 U.S. at 204 n. 3.

[10]Petitioner Norris relies on Justice Scalia's dissent in *Day* as authority for it's proposition that where habeas rules conflict with forfeiture rules, that the forfeiture rule will not apply. Beyond the obvious concerns regarding relying on dissents as persuasive authority, Justice Scalia's dissent found no conflict between the Federal Rules of Civil Procedure and AEDPA with regards to the limitations issue, and would have applied the ordinary forfeiture rule, under which the state in *Day* would have

Relying on *Tyler v. Cain*, 533 U.S. 656 (2001), Mr. Norris, as stated above, confuses the issue of who has the burden to make a particular showing with the distinct question of whether the opposite party can forfeit an argument that the burden has not been satisfied. Petitioner Norris's reliance on *Tyler* is unavailing. In *Tyler*, the Court was speaking to which court and to what standard a claim in a successive petition must be made and must satisfy. *Id.* at 660-661 and n.3. *Tyler*, however, does not speak to whether a defense that a burden has not been met can be forfeited.

Petitioner Norris's reliance on *Bowles v. Russell*, 551 U.S. 205 (2007), is equally unavailing.[11] In *Bowles*, this Court dealt with a district court's extension of a deadline to file a notice of appeal, after the initial time period for filing the notice of appeal had already expired. *Id.* The Court found that the deadline for filing a notice of appeal is jurisdictional, and therefore the petitioner could not rely on forfeiture or waiver of the issue by the state. *Id.* at 213. In contrast, this Court expressly held in *Day* that the AEDPA statute of limitations is an affirmative defense and is not jurisdictional.

Mr. Norris additionally attacks the factual basis of the Eighth Circuit's decision, stating that the court "adopted Sasser's erroneous assertion that the State did not raise the limitations issue at any time before adjudication in the district

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forfeited the timeliness issue it had failed to raise due to miscalculation. *Day*, 547 U.S. at 212-219.

[11]Petitioner Norris raises this line of argument, that Mr. Sasser cannot rely on the forfeiture rule to excuse the alleged untimeliness of his successive petition, for the first time in this petition for certiorari to this Court. It was not raised to the Eighth Circuit below.

court." Pet. at 18. This is a red herring. In the district court, Mr. Norris indeed made passing references to the statute of limitations in a motion to preclude discovery and in a response made to Mr. Sasser's request for discovery. Neither of these references were sufficient to satisfy the requirements of *Day* and the Federal Rules of Civil Procedure that the defense be raised in the first responsive pleading or amendment thereto. *See* Fed. R. Civ. Proc. 8(c). *See also Gray v. Netherland*, 518 U.S. 152, 166 (1996); *Diaz v. Kelly*, 515 F.3d 149, 153 (2d Cir. 2008) (applying Rule 8(c) in a habeas case); *Ford v. Norris*, 67 F.3d 162, 165 (8th Cir. 1995); *Lawrence v. Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994). *See generally* SECTION 2254 RULES 11 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules"). As with other affirmative defenses listed in Rule 8(c), the statute of limitations is not a jurisdictional issue, *see Day v. McDonough*, 547 U.S. 198 (2007). The fact that the state mentions the issue in a motion filed years into the litigation that recites a laundry list of procedural issues and ultimately concerns only discovery patently fails to satisfy the requirement that it be properly presented in a responsive pleading.[12]

[12]Indeed the fact that Mr. Norris did mention the statute of limitations defense before the district court undercuts his argument before this Court. The district court's silence on the matter in the face of Mr. Norris's reference supports the proposition that it considered the statute of limitations, and found that Mr. Sasser's petition was timely, instead rejecting the petition on procedural default grounds.

B. There is No Conflict Between the Eighth Circuit and the Sixth Circuit On This Issue.

Contrary to Mr. Norris's contention, there is no conflict whatsoever between the decision of the Eighth Circuit in this case and the decision of the Sixth Circuit in *In re McDonald*, 514 F.3d 539 (6th Cir. 2008). First, the Eighth Circuit did not find that 28 U.S.C. § 2244(d)(1) is not encompassed by the "requirements" of 28 U.S.C. § 2244(b)(4). Rather, following this Court's holding in *Day*, the Eighth Circuit correctly found that a district court has the discretion, but no obligation, to consider a statute of limitations defense *sua sponte* when the state fails to raise it. The decision of the Sixth Circuit in *McDonald* is in no way to the contrary. Rather, the opinion stands for the distinct proposition that a circuit court may not consider the statute of limitations when deciding whether a petition has met the requirements for receiving permission to file a second petition under § 2244(b)(3)(C). *McDonald*, 514 F.3d at 543-544.

In *McDonald*, the petitioner filed an application for permission to file a successive petition in the Sixth Circuit.[13] In opposition to the application, the government argued that the court should dismiss the application as time barred under 28 U.S.C. § 2244(d)(1)(D). The Sixth Circuit found that issues regarding compliance with the statute of limitations were "not within the purview of the court

[13]In addition to the fact that the holding in *McDonald* does not support his "mandatory" reading of the AEDPA statute and an artificial conflict with the Sixth Circuit, the petitioner in *McDonald* was in a procedurally different position than Mr. Sasser. While Mr. Sasser is on an appeal from the reversal of a denial of a successive habeas petition, the petitioner in *McDonald* was before the Sixth Circuit on a motion for authorization to file.

of appeals' consideration of applications requesting authorization to file a second or successive habeas corpus petition," *McDonald* at 543, and that the matter is left to the district courts to decide in the first instance.[14] In no sense did the Sixth Circuit find that a state may not forfeit the statute of limitations defense by thereafter failing to raise it in the district court.

C. There Is No Disarray in the Lower Federal Courts Regarding "AEDPA's Distribution of Responsibilities of the Courts and of the Parties under 2244(b) and about the Scope of 2244(b)(4)"

Petitioner Norris cites to a number of cases from circuits around the country, contending that they present indicia of confusion regarding the interpretation and application of 28 U.S.C. § 2244(d)(1) in second petition cases. Pet. at 21-22. However, there is nothing reflecting disarray regarding 28 U.S.C. § 2244(d)(1) in the cases cited by Mr. Norris from the Third, Fifth, Seventh, Ninth and Tenth Circuits, which in dicta, all unremarkably state that a successive petition must fall into one of the categories enunciated by 28 U.S.C. § 2244(b)(2) before a district court can consider the merits of the petition, and do not bear at all on the issue of whether Mr. Norris can waive the statute of limitations defense by raising it for the first time on appeal.[15]

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[14]Notably, the court based its decision in part on the fact that, when considering such applications, an appellate court does not yet have a developed record before it and therefore cannot resolve fact bound issues that often arise regarding the application of the statute of limitations, such as the question of equitable tolling. *Id.* This reasoning highlights the impropriety of allowing a state to raise the issue for the first time before the appellate court without allowing the petitioner to develop a record before the district court.

[15]*See Goldblum v. Klem*, 510 F.3d 204 (3d Cir. 2007) (discussing whether to apply AEDPA or pre-AEDPA abuse of writ doctrine to substantive standards for filing successive petitions); *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (dismissing appeal from denial of a successive petition based on the fact that it did not satisfy § 2244(b)(2)(A)); *Bennett v. United States*, 119 F.3d 468 (7th Cir.

The decisions of the Eleventh and Fifth Circuits in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006) and *In re Lewis*, 484 F.3d 793 (5th Cir. 2007), are even more irrelevant. Both are cases in which the circuit court denied authorization to file for second or successive petitions based on statute of limitations issues. While those opinions might be in tension with *McDonald, supra*, the issue they address is not present in this case and so consideration of it will have to wait until the proper case comes before the Court. Mr. Sasser's case was before the Eighth Circuit on appeal after authorization had been granted and the district court had denied the petition, and thus posed a different issue, again, whether Mr. Norris forfeited the statute of limitations defense by not properly raising it until on appeal. In short, there is no disarray for this Court to resolve and certainly none that this Court could address via the case at bar.

D. The Eighth Circuit Considered and Resolved Against Petitioner Norris the Statute of Limitations Issue, and Language Regarding Its Ability To Raise the Statute of Limitations Sua Sponte is Dicta and Irrelevant to the Decision in Mr. Sasser's Case.

While not stated as a Question Presented, Mr. Norris makes a second argument to the Court, that the Eighth Circuit's opinion held that the "discretion to consider the statute of limitations defense *sua sponte* does not extend to the

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1997) (denying of a federal prisoner's request to file a third motion for post-conviction relief under 28 U.S. § 2255, based on a finding that newly discovered evidence insufficient to establish innocence by clear and convincing evidence); *United States v. Villa-Gonzalez*, 208 F.3d 1160 (denial of a federal prisoner's appeal following dismissal of an authorized successive § 2255 motion, determining application of pre-AEDPA versus AEDPA standards and the application of § 2244(b)(4) in § 2255 proceedings); *Ochoa v. Simmons*, 485 F 3d 538 (10th Cir. 2007) (authorizing successive petition containing *Atkins* claim, finding no requirement of a preliminary merits review prior to authorization on an *Atkins* claim).

appellate level," in conflict with this Court's decision in *Day*, and the Seventh Circuit's holdings in *Cotton v. Grisby*, 456 F.3d 727 (7th Cir. 2006), and *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006). However, this statement by the Eighth Circuit is pure dicta, for it considered the statute of limitations issue not *sua sponte*, but rather at the behest of Mr. Norris, and not on a blank slate but in the role of an appellate court reviewing the district court's decision not to address the question *sua sponte* for an abuse of discretion. Again, certiorari should be denied as dicta is not the definitive position of a court and makes Mr. Sasser's case a poor vehicle for the question posed as it was not material to the outcome of his case.

Black's Law Dictionary (8th ed. 2004), defines *sua sponte* as "without prompting or suggestion" or "on its own motion." Black's Law Dictionary (8th ed. 2004) (on-line edition). While the Eighth Circuit noted in passing that it lacks discretion to *sua sponte* raise a statute of limitations defense on behalf of the state, that determination is irrelevant to the decision in Mr. Sasser's case and is not the determination which the Eighth Circuit reached with regards to the actual record of Mr. Sasser's case.

Mr. Norris briefed the statute of limitations issue in his initial brief in the Eighth Circuit. *Sasser v. Norris*, No. 07-2385, Brief for Appellee at 16-29 (8th Cir. Feb. 27, 2008). Mr. Sasser responded to Mr. Norris's statute of limitations arguments as best he could on an undeveloped record in his reply brief before that court. *Sasser v. Norris*, No. 07-2385, Appellant's Reply Brief at 7-31 (8th Cir. Aug. 11, 2008). The issue was also aired at length at oral argument. *Sasser v. Norris*,

No. 07-2385, Oral Argument Transcript at 7-31 (8th Cir. Sept. 25, 2008).[16] Ultimately the Eighth Circuit decided, "[b]ecause the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited and we will not address the defense any further." Pet'r App. at 15.[17]

Mr. Norris argues that statement of the Eighth Circuit in dicta, that it did not have discretion to consider the statute of limitations issue sua sponte, represents a split from the holdings of the Seventh Circuit. However, neither case from the Seventh Circuit cited by Petitioner Norris as support for a claimed circuit split conflicts with the actual holding in this case. In *Cotton v. Grisby*, 456 F.3d 727 (7th Cir. 2006), the petitioner brought his initial habeas petition sixteen years after his conviction for attempted robbery. On appeal to the Seventh Circuit, the state raised the untimeliness of the petition for the first time. The court found that it was "under no obligation to enforce a state's forfeiture or a petitioner's procedural failings." *Id.* at 731. As in Mr. Sasser's case, the court was not raising the issue *sua*

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[16]Mr. Norris also raised his statute of limitations argument in a petition for rehearing en banc, which was denied by the Eighth Circuit. *Sasser v. Norris*, No. 07-2385, Order (8th Cir. Apr. 14, 2009).

[17]Petitioner Norris contends that the Eighth Circuit's holding is "especially troubling," speculating that the district court must have felt constrained by the Eighth Circuit's remand order and that is why the district court did not address the statute of limitations, "despite the fact that it was raised." *See* Pet. at 24, n. 2. This speculation is grossly misleading and inaccurate. Mr. Norris did not properly raise the timeliness of Mr. Sasser's petition. And in any event, the district court clearly did not feel constrained by the Eighth Circuit's remand order.

The remand order directed the district court to address two issues: (1) whether Mr. Sasser was mentally retarded; and (2) whether pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibited his execution. *Sasser v. Norris*, No. 00-4036, Doc. 37, Judgment, at 1 (8th Cir. Aug. 21, 2003). The district court however, quickly added a third issue, asking the parties to address whether Mr. Sasser had defaulted his *Atkins* claim by not raising it in the state courts under a pre-*Atkins* state mental retardation statute, and indeed ultimately decided the case, wrongly, on that basis. *Sasser v. Norris*, No. 00-4036, Doc. 40, Scheduling Order, at 1 (W.D. Ark. Aug. 29, 2003).

sponte, but rather in response to the State's attempt to raise it for the first time on appeal. And, just like the Eighth Circuit, the Seventh Circuit found that,

> it was the state's duty to raise those defenses in the district court, and it has provided us no reason to excuse its failure to do so. . . . The period of limitations set out in 28 U.S.C. § 2244(b)(3) is not jurisdictional, and thus we are not bound to enforce it against a petitioner. *See Day*, 126 S. Ct. at 1681. In this case, it would be inappropriate for us to reach a timeliness argument that the state did not raise in its response in the district court, and which did not form the basis for the district court's ruling.

Cotton v. Grisby, 456 F.3d at 731.

In *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006), the Seventh Circuit did consider a statute of limitations argument made for the first time on appeal. However, it did so because of the particular circumstances of the case before it. *Id.* at 787. In the district court, the petition had been dismissed on exhaustion grounds before the State had an opportunity to file an answer, and so, rather than forfeiting the issue, the state had actually raised it at the earliest possible opportunity. *Id.* The instant case, presenting the entirely different scenario in which the state failed to raise the defense despite filing an answer and having a lengthy opportunity to amend it, is not in conflict.

Of course, Petitioner Norris is correct that this Court in *Day* held that district courts can raise statute of limitations issues *sua sponte*. *See Day*, 547 U.S. at 209. The Eighth Circuit's decision is not in conflict with *Day*. *Day* addressed the discretion of the district court in addressing statute of limitations issue *sua sponte*, and does not address whether the same principles apply on appeal when a district

court has declined to raise the issue *sua sponte*. The Eighth Circuit did not hold otherwise, but rather refused to overlook the State's forfeiture on appeal.

E. Mr. Sasser's Second Petition Was Timely.

In any event, Mr. Sasser's second petition was timely filed and thus this case presents a poor vehicle for deciding issues regarding the interpretation or the duties and responsibilities of the federal courts under 28 U.S. § 2244(b)(4). Mr. Norris admitted in his Brief before the Eighth Circuit that Mr. Sasser filed his Motion to Remand,[18] seeking relief under *Atkins*, within the one-year window. Additionally, Mr. Sasser's Supplemental Motion for Remand, which alternatively requested authorization to file a successive petition, was filed two days after his Motion to Remand, on June 18, 2003, and also within one year of the issuance of the *Atkins* decision. Thus, Mr. Sasser's *Atkins* claim clearly was timely filed.

A motion for authorization is the first pleading in a successive habeas action, and it is the equivalent of a habeas petition filed in the district court in a first petition situation. In the Eighth Circuit, local rules call a motion for authorization an "application for second or successive habeas corpus relief." See 8th Cir. R. 22(B)(a). And, those rules require the motion for authorization to include "the grounds for relief," 8th Cir. R. 22(B)(a)(1), just like an application filed in the

[18]Mr. Sasser's initial motion before the Eighth Circuit was styled a "Motion to Remand and Brief in Support," *Sasser v. Norris*, No. 02-3103, (8th Cir. July 16, 2003); two days after this Mr. Sasser filed a supplemental motion to remand, and alternatively a motion to file a second or successive petition, *Sasser v. Norris*, No.02-3103, Appellant's Supplemental Motion to Remand to the District Court or in the Alternative Motion to File a Second or Successive Petition (8th Cir. July 18, 2003). The district court and the Eighth Circuit have treated Mr. Sasser's application as an application for permission to file a successive petition.

district court, SECTION 2254 RULES 2(c) (stating that a habeas application should contain "the grounds for relief"). The Seventh Circuit, too, has expressly held that motions for authorization are the equivalent of postconviction applications for the purpose of applying the AEDPA. *See Bennett v. United States*, 119 F.3d 468, 471 (7th Cir. 1997) (holding that a motion for leave to file a second or successive application is itself an application for the purposes of applying the AEDPA, and that denial of the motion for leave represents an adjudication of the merits of the underlying application).

Numerous courts across the country have recognized that a motion for authorization satisfies the statute of limitations. *See Buchanan v. Lamarque*, 121 Fed.App'x 303, 316 (10th Cir. 2005) (unpublished) (holding that a "motion for leave to file" a successive petition will satisfy the statute of limitations if filed within the one-year limitations period); *Outlaw v. Sternes*, 233 F.3d 453, 456 (7th Cir. 2000) (characterizing a motion for authorization as an "application" for the purposes of applying the limitations period, and holding that the statute of limitations is satisfied if a motion for authorization is filed within the limitations period); *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (stating that a "petition or motion" should be "filed in this court for the purposes of the limitations periods"); *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996) (stating that the motion for authorization "to this Court" "could be considered in determining the applicant's compliance with the applicable one-year limitations period"). *See also In re Lewis*, 484 F.3d 793 (5th Cir. 2007) (applying the statute of a limitations to a

motion for authorization to file a successive petition, and holding that a timely motion would be an "application" sufficient to satisfy the statute); *In re Daniels*, 2001 U.S. App. LEXIS 27453 (D.C. Cir.) (unpublished) (applying "the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act" to a "motion for leave to file a second or successive motion under 28 U.S.C. § 2255"). *Cf. Whab v. United States*, 408 F.3d 116, 120 (2d Cir. 2005) (stating that "the moment of filing" for a second or successive petition occurs when "the petitioner files directly in the district court or first files an application for gatekeeping approval in the court of appeals").

This result is fully consistent with the policies underlying the AEDPA's statute of limitations.[19] The purpose of the limitations period is to promote the finality of criminal convictions and sentences by ensuring that a petitioner's "claims" are brought before a court within the one-year window. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005). In moving for authorization, a petitioner must place all

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[19] The policy arguments advanced against this interpretation are unpersuasive. The argument that a petitioner can and should be required to file an authorized petition in the district court within the one-year limitations period because the AEDPA requires that the authorization process be completed within just thirty days blinks reality. Courts have uniformly held that the thirty-day limitation on the authorization process is "hortatory or advisory rather than mandatory." *In re McDonald*, 514 F.3d 539, 542 n.2 (6th Cir. 2008).

In practice, especially in death penalty cases, where the stakes are high and the issues are more complex, the authorization process frequently takes many months to complete. Indeed, in this case, it was nearly nine months after Mr. Sasser filed his Motion to Remand (June 16, 2003) that the mandate finally issued (March 9, 2004) to allow the district court to consider his *Atkins* claim. Nearly seven of these months of delay resulted from the State's filing of a motion for reconsideration of the Eight Circuit's initial order. Were a motion for authorization itself insufficient to satisfy the statute of limitations, a petitioner could file his application for authorization a month or more before the expiration of the limitations period and yet still be deemed time-barred if the court fails to rule on his application within the statutory time period, or if the court's ruling is challenged by the respondent.

his "grounds for relief" before the court, *see e.g.* 8th Cir. R. 22B(a)(1), and thus this purpose is fully accomplished by the filing of the motion.

As both Mr. Sasser's motion for remand and his supplemental motion to remand, or in the alternative to file a second or successive petition were both filed in the Eighth Circuit within one year of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), his petition was timely filed, and certiorari in this case should be denied on this ground also.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 11, 2009

No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petitioner for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by Federal Express, postage prepaid, to Kelly Hill, Office of the Attorney General, 323 Center Street, Suite 200, Little Rock, Arkansas 72201-2610.

Executed on September 11, 2009.

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No. 09-45

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In The
Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

ANDREW SASSER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

The Petition for a Writ of Certiorari demonstrated that the Eighth Circuit's decision directly conflicts with AEDPA and with this Court's precedent. Nothing in the Brief in Opposition calls into question the need for this Court to grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit decided the question presented in a manner that directly conflicts with *Williams v. Taylor*, 529 U.S. 420 (2000).

Sasser noticeably does not dispute that the Eighth Circuit's interpretation of the opening clause of 28 U.S.C. § 2254(e)(2) nullifies § 2254(e)(2)(B) in cases involving new rules of constitutional law, and, thereby, directly conflicts with the plain language of the statute. He likewise does not dispute that his state counsels' failure to develop the facts underlying his *Atkins* claim, according to this Court's interpretation of the opening clause in *Williams v. Taylor*, 529 U.S. 420 (2000), triggers application of § 2254(e)(2) to his case, or that the facts he alleged in support of his claim do not satisfy § 2254(e)(2)(B). Rather, he evasively asserts, despite plain indications to the contrary – including his own arguments below – that neither the district court, nor the Eighth Circuit, decided the question of whether 28 U.S.C.

§ 2254(e)(2) applies to bar an evidentiary hearing on his *Atkins* claim. He also feebly attempts to distinguish *Williams*, arguing that because it did not interpret the opening clause of § 2254(e)(2) in a case involving a new constitutional rule, the Eighth Circuit's interpretation of the opening clause does not raise a direct conflict warranting this Court's review. Because the question presented was indeed decided below, and the Eighth Circuit's decision is in direct conflict with this Court's interpretation of § 2254(e)(2)'s opening clause in *Williams*, the petition for writ of certiorari should be granted.

Sasser's surprising assertion that "the district court never reached the question of whether § 2254(e)(2) had any application to this case," is, itself, "seriously misleading." Brief in Opposition at 10, 11. The district court's order denying relief concluded that Sasser triggered application of § 2254(e)(2) when he "did not properly and timely raise [his mental-retardation claim] in his state court appeals." Appendix at 29. While the district court used "procedural default" and § 2254(e)(2) interchangeably, and did not expressly declare that Sasser's lack of diligence triggered application of § 2254(e)(2), that conclusion was obvious from the district court's application of the statute's exceptions, finding that it was "unlikely" that Sasser could satisfy § 2254(e)(2)(A)(i) in light of the availability of a claim under Ark. Code Ann. § 5-4-618 (Repl. 2006), Appendix at 30, n.3, and, in any event, his allegations did not satisfy § 2254(e)(2)(B). Appendix at 30.

Even in the absence of these references to § 2254(e)(2), it cannot be seriously questioned that the district court applied it in Sasser's case. After all, if the district court determined that procedural default altogether barred it from considering the merits of Sasser's *Atkins* claim, as he asserts, Brief in Opposition at 10-11, there would be no reason for the district court to thereafter determine, as it did, his entitlement to an evidentiary hearing, or to conclude, as it also did, that he failed to present sufficient facts demonstrating his entitlement to the writ. Appendix at 31, 32. Indeed, Sasser himself understood the district court's order as applying § 2254(e)(2) to his claim, urging amendment of the judgment because, according to the district court's summary of his argument, "the Court wrongly applied 28 U.S.C. 2254(e)(2) when it decided not to order an evidentiary hearing." Appendix at 39; *see also*, Brief in Opposition at 10, n.6; *Sasser v. Norris*, No. 00-4036, Docket Entry No. 73, Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e), at 31-34 (W.D. Ark. January 23, 2007). Finally, the district court's order denying Sasser's motion to amend the judgment leaves no doubt that it applied § 2254(e)(2) to his *Atkins* claim. Appendix at 39-43.

The Eighth Circuit, moreover, did not merely determine that Sasser's *Atkins* claim survived procedural default, and, thereby, was eligible for an adjudication of its merits – it also directed the manner of that adjudication by ordering the district court to hold an evidentiary hearing. Appendix at 10,

15. It necessarily determined, then, that a hearing was not barred by § 2254(e)(2), and by quoting its rationale in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), it plainly did so for the same reason as in *Simpson* – that § 2254(e)(2)'s opening clause was never triggered because Sasser, like Simpson, can "hardly be said to have lacked diligence" when the Eighth Amendment claim was previously unavailable. Appendix at 7-8 (quoting *Simpson*, 490 F.3d at 1035). Further evincing its belief that § 2254(e)(2) did not apply at all, the Eighth Circuit did not reverse the district court's denial of an evidentiary hearing by evaluating the sufficiency of Sasser's factual allegations differently according to § 2254(e)(2)(B)'s "clear and convincing" standard. Rather, on a mistaken belief that it also derived directly from *Simpson* – that Sasser did not have a full and fair opportunity to develop his mental-retardation claim in state court – the Eighth Circuit evaluated the sufficiency of Sasser's factual allegations according to *Townsend v. Sain*, 372 U.S. 293 (1963), apparently inquiring only whether they could survive dismissal. Appendix at 8, 9-10. The Eighth Circuit, therefore, altogether rejected the district court's finding that § 2254(e)(2) applied to Sasser's *Atkins* claim, and, by doing so, decided the first question presented.[1]

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[1] The State acknowledges that Judge Colloton apparently suggests the Eighth Circuit's decision is restricted to procedural default. Appendix at 50-52. With respect, and assuming that the

(Continued on following page)

Further, Sasser's alternative assertion that the direct conflict alleged in the petition does not exist because "*Williams* did not address the distinct question of how 28 U.S.C. § 2254(e)(2) applies in a 'new rule' situation, as this question was not before the Court," Brief in Opposition at 12, misses the point. That question indeed was not before the Court in *Williams*, because, rather than the exceptions to § 2254(e)(2)'s bar against evidentiary hearings, *see* 28 U.S.C. §§ 2254(e)(2)(A)(i) & (A)(ii), *Williams* decided the issue raised by the first question presented – the meaning of § 2254(e)(2)'s opening clause. 529 U.S. at 430-31. That this Court did not make the error that the Eighth Circuit did here, contravening the plain language of the statute by importing the availability of the legal basis for the claim from § 2254(e)(2)(A)(i) into the statute's opening clause, is actually the point of the direct conflict alleged in the petition. Therefore, despite Sasser's argument to the contrary, a writ of certiorari to resolve the conflict is warranted.

State correctly reads his opinion, Judge Colloton is mistaken for the reasons argued here and in the petition for certiorari.

II. Even if the Eighth Circuit correctly determined that 28 U.S.C. § 2254(e)(2) did not apply to Sasser's *Atkins* claim, the writ should be granted because its decision directly conflicts with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Section 2254 Cases.

Like his first attempt to attack a direct conflict alleged in the petition for certiorari, Sasser misses the point with his argument that the Eighth Circuit's decision, even if it correctly determined § 2254(e)(2) does not apply to his case, does not directly conflict with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Section 2254 Cases. Brief in Opposition at 15-16. While the Eighth Circuit indeed held that the facts supporting Sasser's *Atkins* claim warranted a hearing, and rejected the district court's efforts, on Sasser's representation that more information was forthcoming, to expand the record, Appendix at 9, 11-12, 19-20, 42-43, it did so on the erroneous belief that directly conflicts with *Allison* and 28 U.S.C. § 2254 Rules 7(a) and 8(a): that an evidentiary hearing is the only fact-development procedure that is available once a petition survives dismissal. It also demonstrated that mistaken belief when it restricted the district court to an evidentiary hearing on remand, Appendix at 12, 15-16, holding that the facts alleged in Sasser's case "required an evidentiary hearing, and not some other type of 'remand procedure' crafted by the district court." Appendix at 12.

The Eighth Circuit did not merely disagree, moreover, with the district court's evaluation of an expanded record, as Sasser implies with his reference to the affidavit he proffered in the district court. Brief in Opposition at 16-17. The Eighth Circuit did not acknowledge, let alone reject, the district court's conclusion that the affidavit merely expressed the opinion that Sasser's background "*suggests* he 'may be mentally retarded,'" Appendix at 41, or that it was provisional to the extent that it called for additional evaluation. Appendix at 42. Indeed, the Eighth Circuit held that a hearing was required despite Sasser's acknowledged need for additional proof; again, on its belief that the factual allegations alone were sufficient. Because that decision directly conflicts with *Allison* and the Rules Governing Section 2254 Cases, this Court should grant the petition for certiorari.

III. The Eighth Circuit's decision evades the mandatory statute of limitations imposed on second and successive petitions by 28 U.S.C. § 2244(b)(4).

Sasser agrees that, as a result of the gatekeeping requirements in 28 U.S.C. § 2244(b), "one of the issues . . . a district court is charged with considering is the timeliness of an authorized second petition." Brief in Opposition at 17. This is because § 2244(b)(4)'s reference to "this section" encompasses the limitation provision in 28 U.S.C. § 2244(d)(1). Noticeably absent from Sasser's response, however, is

any discussion, much less mention, of the additional language in § 2244(b)(4) that mandates dismissal of a claim unless the petitioner demonstrates, among other things, that his second or successive petition satisfies the timeliness requirements of § 2244(d)(1).[2] This gatekeeping limitations provision is not subject to the forfeiture rule that the Eighth Circuit applied because it is not merely an inflexible claim-processing rule, but, rather, is a Congressional restriction on a district court's power to adjudicate a claim raised in a second or successive habeas petition. Having missed this critical point, Sasser's entire argument is simply unresponsive to the third question presented in the petition. Brief in Opposition at 17-18.

It is unremarkable, for example, that *Day v. McDonough*, 547 U.S. 198 (2006), recognized that the limitations provision in 28 U.S.C. § 2244(d)(1), because it does not expressly restrict a district court's authority to adjudicate claims raised in an untimely petition, is not, itself, "jurisdictional," – the apparent linchpin of Sasser's argument in response. Indeed, unlike § 2244(b)(4), there is no language in § 2244(d)(1) indicating Congress expressly intended it

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[2] While he does not address opposing authority, Sasser acknowledges the timeliness issue largely concerns whether filing an application for authorization in the court of appeals – rather than a second petition in the district court – stops the one-year clock. Brief in Opposition at 28-31. This acknowledgement of the legal nature of the issue undercuts his argument elsewhere that he was unable to make a record on the issue. Brief in Opposition at 23 n.14.

to limit the district courts' power to adjudicate untimely petitions in general, so it is akin to an inflexible claim-processing rule that "courts have typed 'non-jurisdictional,'" *Day*, 547 U.S. at 205, and that are generally subject to forfeiture. *See Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (differentiating time prescriptions that delineate classes of cases within a court's adjudicatory authority, which are not subject to forfeiture, from those that are inflexible claim-processing rules, which are subject to forfeiture). *See also Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam) (same).

Focused on this "jurisdictional" point made in *Day*, Sasser apparently misses the significance of the Court's holding that, despite its "non-jurisdictional" or claim-processing-rule status, the limitations provision, standing alone, is sufficiently like other traditional threshold barriers to habeas relief so as to be incompatible with the strict rule of forfeiture embodied in the Federal Rules of Civil Procedure and deserving of different treatment in keeping with Habeas Rule 11. *Day*, 547 U.S. at 208-09. He, therefore, necessarily misses the State's point that, as incorporated into AEDPA's gatekeeping provision by § 2244(b)(4), with its requirement of mandatory dismissal for non-compliance, the limitations statute is rendered even more incompatible with the forfeiture rule in successive-petition cases than it was in the first-petition case of *Day* and, therefore, is deserving of different treatment.

In § 2244(b)(4), Congress made clear its intent to prohibit a district court from adjudicating a claim in a second or successive petition unless the petitioner first demonstrates the petition is timely. Indeed, by giving the limitation provision the extraordinary effect of mandatory dismissal for non-compliance and by drawing the limitation provision into the district court's gatekeeping mechanism, itself, Congress plainly indicated that the primary goal of the limitation provision in successive-petition cases is much greater than simply protecting defendants from unduly delayed claims, a protection to which the forfeiture rule would apply. Rather, Congress specifically crafted this statute with an eye toward achieving a much broader, system-related goal beyond a defendant's case-specific interest in timeliness. "The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand and Gravel v. United States,* 552 U.S. 130, ___, 128 S.Ct. 750, 753 (2008). Both Sasser and the Eighth Circuit missed this jurisdiction-like quality of § 2244(b)(4). Where a court's adjudicatory authority over a class of cases is conditioned on a time prescription, as is the case in § 2244(b)(4), the forfeiture rule will not apply even in ordinary civil cases. A party cannot expand a court's adjudicatory authority by its conduct – that is, by failing to assert the lapse of a time prescription that circumscribes that authority. Section 2244(b)(4) makes consideration

of the limitations issue part of a district court's independent and *sua sponte* gatekeeping responsibility, and it precludes adjudication of any claim absent a petitioner's preliminary demonstration that his petition is timely as a threshold matter. Sasser's reliance on *Day*'s determination that § 2244(d)(1), standing alone, is not a "jurisdictional" limitation, therefore, simply misses the mark – as does the Eighth Circuit's decision on this point.

Moreover, though he argued to the contrary in the Eighth Circuit, Sasser now also concedes that the State presented the timeliness issue before final adjudication in the district court, contrary to the finding that formed the premise for the Eighth Circuit's decision to apply the forfeiture rule. Brief in Opposition at 20-21. Sasser dismisses the erroneous nature of the Eighth Circuit's premise, however, by insisting that, under *Day* and Rule 8(c) of the Federal Rules of Civil Procedure, the State nevertheless was obligated to assert the limitations issue in its first responsive pleading or in a formal amendment thereto in order to avoid forfeiture. Brief in Opposition at 21. Though this requirement is not found in *Day*, where the State never argued a limitations bar and, in fact, expressly conceded the limitations issue in its answer, according to Sasser, "[t]he fact that the state mention[ed] the issue in a motion filed years into the litigation that recites a laundry list of procedural issues and ultimately concerns only discovery patently fails to satisfy the

requirement that it be properly presented in a responsive pleading." Brief in Opposition at 21.

Like his "jurisdictional" litmus test that focused only on § 2244(d)(1), Sasser's inflexibility here again demonstrates his misunderstanding not only of *Day* and the flexible relationship of the Civil Rules to habeas proceedings, but also the Civil Rules themselves. Although in ordinary civil cases, the Civil Rules require that affirmative defenses generally must be raised in a first responsive pleading, *see* Fed. R. Civ. P. 8(c), it is widely recognized that "a defense may be raised in a number of ways even if the defense is not presented in the initial response" – including by pretrial motion and for the first time on appeal – and forfeiture will not apply where, as here, no prejudice has accrued from any delay. 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005). *See also* 5 Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1278, at 666-73, 685-87 (2004). It is further recognized that the judiciary plays a distinctive role in enforcing jurisprudential and Congressional limitations on habeas relief, even where doctrines of forfeiture might preclude their enforcement in private civil litigation. In *Granberry v. Greer,* 481 U.S. 129 (1987), for example, the Court held that a court of appeals has the power to dismiss a habeas petition for failure of a petitioner to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. *Id.* at 134. Though *Granberry* informed the Court's decision in *Day*, Sasser's brief in opposition is completely silent

about *Granberry*'s recognition that the forfeiture rule in habeas cases is not necessarily determined exclusively by reference to the State's answer or formal amendments to it. No purpose would be served by insisting on such formality, especially in a context in which courts have an express obligation to dismiss a claim if it is presented in an untimely, successive petition or where, as here, the habeas petitioner has suffered no prejudice. For that reason, even assuming the forfeiture rule of *Day* applied to the gatekeeping provision in § 2244(b)(4), Sasser's concession that the State raised the timeliness issue before any discovery was allowed renders the Eighth Circuit's decision contrary to *Day* and *Granberry*.

CONCLUSION

The petition for writ of certiorari should be granted.

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